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# The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII

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# THE ROLE OF FAULT AND MOTIVE IN DEFINING DISCRIMINATION: THE SENIORITY QUESTION UNDER TITLE VII

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*Seniority systems play an important role in American industry, often governing rights to promotion, pay scales, layoff, and relative entitlement to ancillary benefits. Seniority based decisionmaking protects employees from arbitrary employer action, yet seniority's same protective feature often may frustrate minorities' efforts to achieve actual equal employment opportunity. Relying on Title VII's section 703(h), the Supreme Court has held that seniority systems are immune from attack unless discriminatory intent is shown. In this Article, Professor Brodin reviews the evolution of the intent standard now governing seniority system challeges. He contrasts the Supreme Court's restrictive definition of intent in the seniority system context with the concept of intent found in other sections of Title VII, and in tort and criminal law. He argues that the Court's restrictive definition of intent is neither consistent with the legal system's approach to other conduct with socially injurious effects, nor facilitative of the policies represented by Title VII.*

Eleven years after the end of the American Civil War the Supreme Court decided *United States v. Cruikshank*,[1] involving the criminal prosecution of a group of white men charged with conspiracy to deny blacks the free exercise of their constitutional rights. The blacks had assembled in their town of Colfax, Louisiana to protest the results of a local election. In what came to be known as the Colfax Massacre, the white group set fire to the building in which the blacks were gathered and shot them as they attempted to escape. In reversing the convictions of the defendants, the Supreme Court held that the indictments were defective because they failed to allege an essential element of the crime, specific intent to deprive the victims of constitutional rights "because of" their race and color.[2] Apparently, neither the facts surrounding the particular white-on-black confrontation, nor the tragic results of the defendants' riotous actions, nor even the historical setting of racial violence in the South were

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1. 92 U.S. 542 (1876). This decision is discussed in D. BELL, RACE, RACISM, AND AMERICAN LAW § 5.3, at 210-12 (2d ed. 1980); R. KLUGER, SIMPLE JUSTICE 74-75 (1976). While 96 men were indicted, only nine were actually arrested and charged. The indictments were secured by the Department of Justice under section six of the Enforcement Act of May 31, 1870 (codified at 18 U.S.C. § 241 (1982)), providing for imprisonment or fine for conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or employment of any right or privelege secured . . . by the Constitution or laws of the U.S."

2. *Cruikshank*, 92 U.S. at 554, 559.

sufficient to satisfy the Court's insistence that the perpetrators' discriminatory intent be alleged and proved.[3]

This Article focuses on a contemporary version of the doctrine of specific intent, and explores its application in a different civil rights context, namely in litigation challenging seniority systems and seniority based layoffs brought under Title VII of the Civil Rights Act of 1964.[4] Since 1971, the Supreme Court has interpreted Title VII to prohibit employment practices that are discriminatory in their effect even if such result is unintended and the employer acted with no design to discriminate.[5] The Court has, however, read Section 703(h)[6] of Title VII to insulate from challenge any "bona fide seniority system," no matter how adverse its impact on groups protected by the Act, unless the challengers prove that the system is a manifestation of the employer's or union's discriminatory intent, defined as actual motive and purpose.[7]

Seniority-based decisionmaking threatens to reverse the gains made by minorities and women over the last two decades. The most dramatic illustration of this is the almost universal operation of last hired-first fired layoff practices. Minorities and females, previously excluded from many employment opportunities and only recently accepted into these jobs, find themselves the first laid off (because of their low seniority) in times of economic decline.[8]

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3. It appears that the case law still requires, for conviction under 18 U.S.C. §§ 241-242 (1982), that the defendant be shown to have had the specific purpose of depriving the victim of a federal right. Such intent can, however, be inferred from the circumstances. *See* United States v. Guest, 383 U.S. 745, 753-54 (1966) (indictment under 18 U.S.C. § 20 (1982)); Screws v. United States, 325 U.S. 91, 106 (1945) (indictment under 18 U.S.C. § 241 (1982)); Eisenberg, *Reflections on a Unified Theory of Motive*, 15 SAN DIEGO L. REV. 1147, 1150 n.13 (1978).

4. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981). Title VII prohibits employers and unions from engaging in discriminatory employment practices on the basis of race, color, religion, sex, or national origin. The Act's general prohibitory language is broad, reaching practices which "in any way . . . would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(2) (1976) (employer practices); *see also id.* § 2000e-2(c)(2) (labor organization practices).

5. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed *infra* notes 52-67 and accompanying text.

6. Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1976).

7. *See infra* notes 78-120 and accompanying text. The Court has recently applied a similar intent standard to seniority challenges brought under Title VI of the Act (42 U.S.C. § 2000d to 2000d-6 (1976 & Supp. V 1981)) as well, *see infra* notes 121-42 and accompanying text, even though Title VI contains no counterpart to section 703(h).

8. The statistical impact of actual and potential last hired-first fired layoffs is suggested in W. MURPHY, J. GETMAN & J. JONES, DISCRIMINATION IN EMPLOYMENT 168-70 (4th ed. 1979); U.S. COMMISSION ON CIVIL RIGHTS, LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS 22-27 (February 1977); Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177, 178-79 (1975); Note, *Alternatives to Seniority Based Layoffs: Reconciling* Teamsters, Weber, *and the Goal of Equal Employment Opportunity*, 15 U. MICH. J.L. REF. 523, 523 & n.1 (1982). To take the example of the Boston police and fire departments, which did not hire minorities (other than in isolated instances) until they were ordered to do so by courts in the early 1970s, seniority-based layoffs in 1981 threatened to cut in half the substantial gains made in minority employment. *See infra* note 142.

Prevailing Supreme Court doctrine would preclude a successful systemic challenge to this practice unless plaintiffs have persuasive evidence that the seniority system is being operated *in order* to discriminate against them, and not merely with that *effect*. Thus, most seniority systems are permitted to perpetuate the effects of past discrimination into the present and the future.[9]

Focusing on the motives of the employer and union rather than on the adverse effects of their practices accords with a recent trend in Burger Court thinking. A majority of the justices now seem to view discrimination not as a class based phenomenon with societal causes, but as series of discrete, aberrant acts by individuals harboring personal hostility toward the victim. Elimination of discrimination requires, from this perspective, not so much social engineering as restraint of the blameworthy offenders.[10]

This Article critiques the adoption of a fault-premised, motive-centered standard for determining the legality of seniority systems and layoff schemes. It begins by tracing the genesis of the specific intent requirement in the language and legislative history of Title VII and then follows the Supreme Court's developing interpretation of the Act as it bears upon seniority systems. A comparison of the intent defined in this connection and its analogues in tort and criminal law are explored. The Article next surveys the lower courts' application of the motive standard to seniority challenges. The final section discusses the policy implications of the intent requirement in these Title VII actions.

## I. TITLE VII AND SENIORITY SYSTEMS—THE DEVELOPMENT OF THE INTENT REQUIREMENT

Title VII, designed by Congress to eradicate racial discrimination from the American workplace,[11] defined discrimination broadly, making unlawful any conduct by an employer or union "which would deprive or tend to deprive any individual of employment opportunities."[12] The Supreme Court gener-

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9. As Dean Derek Bell has observed:

> We have witnessed hard-won decisions, intended to protect basic rights of black citizens from racial discrimination, lose their vitality before they could be enforced effectively. In a nation dedicated to individual freedom, laws that never should have been needed face neglect, reversal, and outright repeal, while the discrimination they were designed to eliminate continues in the same or more sophisticated form. In many respects, the civil rights cases and laws of the 1950s and 1960s are facing a fate quite similar to civil rights measures fashioned to protect the rights of blacks during an earlier racial reconstruction period more than a century ago.

D. BELL, *supra* note 1, at xxiii.

10. *See* Freeman, *Legitimizing Race Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978).

11. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 26 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401 (the purpose was "to eliminate . . . discrimination in employment based on race, color, religion, or national origin").

12. Section 703 provides in part that:

> (a) Employer practices: It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

ally has interpreted this statute to prohibit employment practices that are discriminatory in effect and are not compelled by business necessity, even if they are not specifically intended to discriminate.[13] Yet relying on section 703(h),[14] an ambiguous provision of Title VII that singles out seniority systems for special treatment, the Court repeatedly has held that seniority systems with discriminatory effects are not unlawful unless they are the product of a proven intent to discriminate.[15] There must be, therefore, "a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system," with "discriminatory intent here mean[ing] actual motive";[16] otherwise the system is immune from challenge regardless of its adverse impact on minorities. This section of the Article summarizes the evolution of this specific intent requirement.

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privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . . .

. . . .

(c) Labor organization practices: It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; . . . .

42 U.S.C. §§ 2000e-2(a), 2(c) (1976).

13. *See infra* notes 52-67 and accompanying text.

14. 42 U.S.C. § 2000e-2(h) (1976).

15. *See infra* notes 103-120 and accompanying text.

16. *See infra* note 112 and accompanying text.

### A. *Section 703(h)—Language and Legislative History*[17]

The original version of Title VII[18] made no explicit reference to seniority systems. This led several members of Congress to express concern that the statute would invalidate such systems either by requiring that employers achieve a racially balanced workplace notwithstanding seniority arrangements, or by compelling employers who had previously excluded blacks to revise their seniority systems when blacks were hired.[19] Proponents of the bill denied that it would have this effect.[20] Senators Clark and Case, leaders in the fight for enactment of Title VII, submitted an interpretative memorandum (prepared by the Justice Department at their request) which asserted that the bill as then drafted was prospective only, would not affect established seniority rights, and would not require revision of seniority practices to accommodate for past discrimination.[21] Another statement of the Justice Department which

17. Title VII, § 703(h) has an "unusual legislative history" which is characterized by "the absence of the usual legislative materials." Franks v. Bowman Transp. Co., 424 U.S. 747, 761 (1976). The situation resulted from the turmoil following the assassination of President John F. Kennedy and the strong desire of Lyndon Johnson and others to promptly enact a civil rights law. *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). The original version of the statute adopted by the House generated a report by the Judiciary Committee. But the Act that finally was adopted was a significantly modified substitute bill adopted by the Senate, and it did not go through committee procedure. Thus:

> Unfortunately the legislative history of the Civil Rights Act of 1964 is recorded not so much in Committee Reports as in the pages of the Congressional Record in which are recorded the debates and arguments of both opponents and proponents . . . . Admittedly this is not the kind of legislative history on which courts are accustomed to rely.

*Id.* at 457-58.

The legislative history of § 703(h) has been the subject of much scholarly and judicial attention. *See generally* W. MURPHY, J. GETMAN & J. JONES, *supra* note 8, at 168; Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1607-15 (1969); Poplin, *supra* note 8, at 187-88; Rachlin, *Title VII: Limitations and Qualifications*, 1965 B.C. INDUS. & COM. L. REV. 473; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1548 (1975) [hereinafter cited as Note, *Last Hired*]; Note, *Title VII v. Seniority: Ensuring Rights or Denying Rights?*, 26 How. L.J. 1487 (1983); Note, *supra* note 8, at 526. *See also* American Tobacco Co. v. Patterson, 102 S. Ct. 1534, 1538-41 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 342-55 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

18. H.R. 7152, 88th Cong., 1st Sess. (1963). *See also* H.R. REP. No. 914, 88th Cong., 1st Sess. 9-15 (1963).

19. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 62, 65-66, 71 (1963) (minority report), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2431, 2433, 2439-40; 110 CONG. REC. 486-88 (1964) (remarks of Sen. Hill); *id.* at 2726 (remarks of Rep. Dowdy); *id.* at 7091 (remarks of Sen. Stennis).

20. *See* 110 CONG. REC. 1518 (1964) (remarks of Rep. Celler); *id.* at 6549 (remarks of Sen. Humphrey); *id.* at 6564 (remarks of Sen. Kuchel).

21. 110 CONG. REC. 7212-15 (1964) (Interpretive Memorandum of Title VII of H.R. 7152 submitted jointly by Sen. Joesph S. Clark and Sen. Clifford P. Case, floor managers). The memorandum explained:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the

was placed in the record explicitly asserted that the bill would not prohibit layoffs in reverse seniority order, "even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."[22] A set of answers to questions raised by Senator Dirksen provided the same assurance that differences in the treatment of employees based on seniority, including a last hired-first fired layoff practice, would not violate the Act.[23]

Nevertheless, attempts were made in both Houses to write into the Act an explicit protection for seniority systems. Representative Dowdy proposed language which would have exempted completely "employment practices [that] are pursuant to . . . a seniority system."[24] This amendment was defeated without debate.[25] Senators Mansfield, Dirksen, and Humphrey later offered an amendment[26] to the substitute bill (which was enacted as Title VII) that was approved unchanged and became section 703(h) of the Act.[27] This section provides:

> Notwithstanding any other provision of this title, it shall not be

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title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.).

*Id.* at 7213.

22. *Id.* at 7207. The report further stated that:

> Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

*Id.*

23. *Id.* at 7216-17 (response to Dirksen Memorandum). A portion of this response provided that:

> Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
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> Answer. Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.
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> Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
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> Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.

*Id.* at 7217.

24. *Id.* at 2727.

25. *Id.* at 2728.

26. *Id.* at 11,926, 11,930-34 (1964). Senator Humphrey explained that the addition of 703(h) "merely clarifies [Title VII's] present intent and effect." *Id.* at 12,723.

27. 42 U.S.C. § 2000e-2(h) (1976).

> an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .[28]

Neither the language of section 703(h) nor its surrounding history provides much guidance regarding what the 88th Congress intended to do with seniority systems challenged under Title VII.[29] Unlike the Dowdy Amendment, which would have removed from the Act's prohibitions *all* employment decisions based on a seniority system, the exemption that was adopted covers only decisions based on a "bona fide" seniority system, and insulates differences in treatment based on such systems only if they are not the result of an "intention to discriminate" on the basis of race.[30] Moreover, the Clark-Case memorandum and the other similar statements contending that Title VII in its original form did not intrude on seniority systems or last hired-first fired layoff practices were prepared and submitted prior to the proposal and approval of section 703(h) and thus are of little help in interpreting its language.

What did Congress mean by "bona fide seniority system"? Can we have a "bona fide" seniority system that nevertheless produces differences in treatment which are the "result of an intention to discriminate"? Or do both requirements rise and fall together? And, perhaps more problematical, does the proviso's "intention to discriminate" language refer to the seniority system itself (*i.e.*, a seniority system negotiated, designed, or maintained with the inten-

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28. *Id.*

29. As two commentators put it: "The conclusion that will be drawn from the language of Title VII and its legislative history will undoubtedly reflect the observer's disposition on the abstract question of whether the application of seniority rules to new black workers in a formerly white-only seniority unit constitutes discrimination on grounds of race." Cooper & Sobol, *supra* note 17, at 1611.

The ambiguity of the legislative history is illustrated by one writer's difficulty in drawing any consistent conclusions. *Compare* Note, *Last Hired, supra* note 17, at 1548 ("The legislative history of Title VII is a major obstacle to reforming seniority systems under the theory that present employment decisions based on criteria which reflect past discrimination are prohibited."), *with id.* at 1549 (Referring to the fact that the Clark/Case memo states that an employer cannot base future hiring decisions on referral waiting lists compiled in a discriminatory manner *before* the Act: "The force of this history is not clear, however, because there are some indications that where Congress realized that nondiscrimination in the future could not be accomplished without frustrating the expectations of white employees, the goal of nondiscrimination was to prevail.").

30. The ambiguities in the language of § 703(h), as compared with the clear command of the Dowdy proposal, no doubt reflect the fact that the section represented a political compromise. It has been reported that *some* form of seniority protection was demanded by the AFL-CIO as a condition for its legislative support of the Civil Rights Act of 1964. *See* W. MURPHY, J. GETMAN & J. JONES, *supra* note 8, at 168; *see also* Poplin, *supra* note 8, at 195.

The Supreme Court has observed with regard to another Title VII provision:

> It is unquestionably true that the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices, and that that basic policy must inform construction of this remedial legislation. It must also be recognized, however, in light of the tempestuous legislative proceedings that produced the Act, that the ultimate product reflects other, perhaps countervailing purposes that some members of Congress sought to achieve. The present language was clearly the result of a compromise. It is our task to give effect to the statute as enacted.

Mohasco Corp. v. Silver, 447 U.S. 807, 818-19 (1980).

tion to discriminate) or does it also include a neutral system that perpetuates a past "intention to discriminate" (*i.e.*, a past refusal to hire black workers)? Moreover, what does "intention to discriminate" mean? Does it require a showing of actual motive, or the mere foreseeability of the discriminatory results, or simply that the employer has acted deliberately and not accidentally?

On this last point, it is significant that Title VII uses "intent" language in three of its other provisions: the test clause of section 703(h)[31] with regard to professionally developed ability tests; section 706(g)[32] with regard to the relief a district court may order; and section 707(a)[33] with regard to the authority of the Attorney General to bring a civil action. The courts have interpreted each of these provisions to require something other than specific intent and discriminatory purpose. The proviso in the ability test clause of section 703(h) has been read by the Supreme Court to prohibit the use of a test that is not job related and has a discriminatory impact, regardless of the employer's actual design or intent, and even if the employer makes good faith efforts to compensate for its discriminatory effect.[34] It is equally well settled that use of the term "intentionally" in section 706(g) to describe the type of discriminatory practice for which relief is available refers only to conduct that is deliberate, rather than accidental.[35] And the intent requirement of section 707(a) has been con-

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31. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to . . . give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate.

42 U.S.C. § 2000e-2(h) (1976).

32. "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . ." *Id.* § 2000e-5(g).

33. Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights. . .

*Id.* § 2000e-6.

34. *See* Connecticut v. Teal, 457 U.S. 440, 451-52 (1982). The Court held that this interpretation is compelled by the legislative history of the provision. This reading of the testing provision has been favored by the Court since Griggs v. Duke Power Co., 401 U.S. 424 (1971), *see infra* notes 57-67, when it expressly rejected the argument that § 703(h)'s proviso required a showing of malevolent intent in order to successfully challenge a professionally developed ability test. *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). For an early scholarly interpretation of the testing provision, see Cooper & Sobol, *supra* note 17, at 1637-69. Cooper and Sobol interpreted the testing provision as follows:

> As soon as an employer is, or should reasonably be, on notice that a test is not predictive of job performance and is disproportionately screening out blacks, the discrimination that results can realistically be interpreted as "intended." Intent, under this interpretation, is not frozen at the time a test is adopted, but rather continues to evolve as the context of the test changes. Moreover, any test causing this result is being "used" to discriminate, whether or not so intended.

*Id.* at 1653.

35. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1395 (2d ed. 1983).

> Although the language of the statute appears to require a specific finding that the discrimination was intentional, this requirement has been, to a large degree, judicially eliminated. Relying upon the conclusion in Griggs v. Duke Power Co., that the thrust of Title VII is "to the *consequences* of employment practices, not simply the motivation," numerous courts have interpreted "intentionally" to mean that the practices are not "accidental," and have not required proof that the practices are the result of an intent to discriminate.

strued to require that the challenged conduct be merely "deliberate."[36]

There is no clear support in the language or legislative history of Title VII to justify a distinction between the intent required in seniority challenges and the intent required in the other similarly worded provisions. The Supreme Court's interpretation of the ability test clause of section 703(h), for example,

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*Id. See also* United States v. Central Motor Lines, 338 F. Supp. 532, 559 (W.D.N.C. 1971), *quoted in* Slack v. Havens, 7 Fair. Empl. Prac. Cas. 885, 890 (S.D. Cal.), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975) ("In cases under Title VII, the 'intent' required by the statute may be inferred from the defendant's conduct. The statute requires only that a defendant has meant to do what was done; that is, the act or practice must not be accidental."). Thus, in a *Griggs*-type case alleging disparate impact, the "intentional" conduct necessary to satisfy § 706(g) exists if the employer acted deliberately, and not accidentally. *See* Spurlock v. United Airlines, 475 F.2d 216, 218 (10th Cir. 1972). The court wrote in Local 189, Papermakers & Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970):

> Section 706(g) limits injunctive (as opposed to declaratory) relief to cases in which the employer or union has *"intentionally engaged in"* an unlawful employment practice. Again, the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental. The relevant legislative history, quoted in the margin, bears out the language of the statute on that point.

This reading of the intent requirement of § 706(g) seems in accord with the legislative history. When the section was first introduced, it used the word "willfully," a term stronger than the substituted "intentionally" in the final version. Senator Dirksen explained the final language as requiring only that the act be engaged in "intentionally or purposely, as distinguished from an accidental act." 110 CONG. REC. 8194 (1964). *See* Cooper & Sobol, *supra* note 17, at 1674 n.17 and accompanying text.

Cooper and Sobol, agreeing that the legislative history of § 706(g) compels the conclusion that specific intent is not required, suggested that Congress did not mean the term "intentionally" to be frozen in time. Rather, once an employer becomes aware of the adverse impact of the practice, his continuation of it contributes sufficient "intent" to discriminate even if such intent did not exist earlier. *Id.* at 1675.

It should be noted that several changes were made in § 706(g) when title VII was amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-19 (1976 & Supp. V 1981), but no alteration was made in the intent provision. Interestingly, the section-by-section analysis prepared by Senator Williams to explain the 1972 Amendments omits mention of the intent language that was preserved. *See* 118 CONG. REC. 7166, 7168 (1972) ("Section 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent . . . .").

36. *See* Local 189, Papermakers & Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970):

> Section 707(a) allows the Attorney General to enforce the Act only where there is a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter" and where the pattern or practice "is *intended* to deny the full exercise of the rights herein described." Defendants contend that no such condition existed here.

The *Papermakers* court considered Dobbins v. Local 212, International Bhd. of Electrical Workers, 292 F. Supp 413, 448 (1968), in which the same point was raised and rejected:

> "In reviewing statutes, rules or conduct which result in the effective denial of equal rights to Negroes or other minority groups, intention can be inferred from the operation and effect of the statute or rule or from the conduct itself. The conduct of defendant in the present case "by its very nature" contains the implications of the required intent . . . . Thus the Attorney General has a cause of action when the conduct of a labor organization in relation to N[egroes] or other minority groups has the effect of creating and preserving employment opportunitites for W[hites] only. Section 707(a) of the Civil Rights Act of 1964."
>
> Here, as in *Dobbins,* the conduct engaged in had racially-determined effect. The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them. Section 707(a) demands no more.

*Id.* at 996-97.

contradicts the legislative history's explicit language stating that an employer could set any qualification it desired, regardless of its negative impact on minorities, as long as intent to discriminate was lacking.[37] Thus it has been observed: "The legislative history concerning testing is clearly no less adverse to the result reached in the testing cases than the legislative history dealing with seniority is to the application of the perpetuation [effect centered] principle[38] to seniority systems."[39] Nevertheless, as will be seen in the next section, the Court has developed just such a distinction in the meaning of intent. It has interpreted the seniority proviso as requiring an inquiry into motive and purpose that is not required when applying the other "intent" clauses.

As one writer has observed regarding Title VII and the seniority question:

> [T]he statute conflicts with itself. While on the one hand Congress did wish to protect established seniority rights, on the other it intended to expedite black integration into the economic mainstream and to end, once and for all, the de facto discrimination which replaced slavery at the end of the Civil War.[40]

Given this schizophrenic intent of the 88th Congress, "it is perhaps not unreasonable to conclude . . . that Congress chose to leave the resolution of the problems posed by seniority to the courts rather than codify in the act the concerns expressed in the Senate debates."[41] A major issue to be resolved was the meaning of "intention to discriminate" as set out in section 703(h).

### *B. The Seniority Question—The Early Case Law*[42]

Title VII became effective in 1965 and, not suprisingly, one of the first questions to be litigated was the Act's treatment of seniority. For places of employment that previously had been racially segregated or exclusive, these former practices had a continuing impact on employment opportunities through the operation of the seniority system. Minorities who had been steered into segregated, low-paying jobs before 1965 found that their newly won right to transfer to better jobs often meant a forfeiture of their accumulated seniority. This was because many plants operated under departmental, not company, seniority systems. Seniority built up in an all-black maintenance department could not, for example, be transferred to the better paying production department, and thus transfer meant that the minority employee would come into the newly integrated department with the same seniority as a new company employee. Thus, he was at the bottom of the pecking order for

37. *See* Note, *Last Hired*, *supra* note 17, at 1551-52.

38. *See infra* notes 46-51 and accompanying text.

39. Note, *Last Hired*, *supra* note 17, at 1551.

40. Poplin, *supra* note 8, at 191.

41. Note, *Last Hired*, *supra* note 17, at 1550. *See also* Cooper & Sobol, *supra* note 17, at 1614.

42. The case law development under § 703(h) has been the subject of much recent attention. *See* Kasold, *Toward Definition of the Bona Fide Seniority System*, 35 U. FLA. L. REV. 41 (1983); Marinelli, *Seniority Systems and Title VII,* 14 AKRON L. REV. 253 (1980); Zimmer, *Title VII: Treatment of Seniority Systems*, 64 MARQ. L. REV. 79 (1980).

promotion and assignment, and was also subject to the real risk of seniority based layoff if the plant's work slowed down. Consequently, blacks were encouraged to remain in their segregated, but relatively secure, low-paying positions. Seniority-based decisionmaking thus locked minorities into the jobs given them by prior overt discrimination. For minorities who had been excluded entirely from a shop, use of the seniority factor would perpetuate the prior discrimination into future decisionmaking.

On the other hand, however, was the significant place that seniority occupied in American labor-management relations.[43] Basing promotions, layoffs, and other decisions on seniority had become common throughout unionized industry. Seniority is perceived as serving the interests of the main actors in the workplace.[44] To the union, employer, and worker, seniority is a neutral criterion for making decisions, viewed as an improvement on systems leaving individual discretion in the hands of supervisors. It is thus an important selling point for organizers attempting to market unionization to the workers. It permits workers to predict their future employment positions. "American labor has long favored the use of strict seniority systems because of the job security they foster. Length of service provides a uniform objective standard by which an employer may measure benefits such as pension rights, promotions, transfers, and job protection. Seniority thus eliminates subjective or arbitrary treatment of employees . . . ."[45] Finally, seniority systems help the employer retain its more experienced employees.

United States District Judge Butzner, sitting in Virginia, faced the unenviable task of interpreting section 703(h) as a matter of first impression. *Quarles v. Philip Morris, Inc.*[46] involved a plant that, until 1966, was formally segregated and in which the collective bargaining agreement prohibited transfer from the black prefabrication department to the better paying white shipping department. In 1966 the collective bargaining agreement was amended to permit employees to transfer from prefabrication to shipping, but only with a complete loss of seniority because of the departmental (not company) seniority computation. Quarles, a black man employed by Philip Morris for nine years as a laborer in the prefabrication department, had sought unsuccessfully a transfer to a driver position in shipping prior to 1966. The new collective bargaining agreement gave him the opportunity to transfer to the shipping department, but, since he would begin in that department with no seniority at

43. *See* Cooper & Sobol, *supra* note 17, at 1601-02 ("The use of competitive status seniority to govern promotions, demotions, and layoffs is a fundamental aspect of industrial relations in this country. In nearly all businesses of significant size whose employees are organized, a seniority system plays some role in determining the allocation of the work."). The other type of seniority, benefit seniority, determines entitlement to fringe benefits. The Title VII problem has arisen primarily with regard to competitive seniority. *See generally* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 HARV. L. REV. 1532 (1961).

44. *See generally* Aaron, *supra* note 43; Cooper & Sobol, *supra* note 17, at 1595, 1604-07; Note, *supra* note 8, at 168.

45. Note, *supra* note 8, at 528 (footnotes omitted).

46. 279 F. Supp. 505 (E.D. Va. 1968). This case as well as the other early cases mentioned below are discussed generally in Cooper & Sobol, *supra* note 17, at 1615-29; Poplin, *supra* note 8, at 180-85; Note, *Last Hired*, *supra* note 17, at 1545-57.

all, he would not be able to obtain a driver position.[47] Quarles sued under Title VII, challenging this transfer and seniority policy.

Noting that Quarles, if he transfered, "would find himself junior to white employees holding less employment seniority [and] who got their positions by reason of the company's former racially segregated employment policy,"[48] Judge Butzner held that Title VII had been violated. The departmental transfer and seniority practices, superimposed on a racially segregated plant, had the effect of perpetuating the effects of past discrimination. The court read section 703(h)'s requirement that a seniority system be "bona fide" before it is protected from challenge as requiring a lack of discriminatory effect,[49] even if the system itself had not been shown to result from a discriminatory purpose. Judge Butzner went on to interpret the section 703(h) proviso "that such differences are not the result of an intention to discriminate because of race" as referring to the intentional discrimination committed by Philip Morris *up until 1966*:

> The differences between the terms and conditions of employment for whites and negroes about which plaintiffs complain are the result of intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the act are maintained now. The act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority of negroes and whites that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the provisions of § 703(h).[50]

Judge Butzner dispensed with the legislative history of section 703(h) with the observation that "Congress did not intend to freeze an entire generation of negro employees into discriminatory patterns that existed before the act."[51]

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47. *Quarles* thus presents one of three paradigm cases of perpetuation of past discrimination through operation of a seniority system; black applicants were previously steered into undesirable departments, and loss-of-seniority provisions prevent their subsequent transfer. In the other cases, blacks were either denied employment entirely in the past, and thus, when finally hired years later, lacked accumulated seniority possessed by their white colleagues; or blacks were deterred from applying because they knew such effort would be futile, and when ultimately hired find themselves attempting to catch-up in seniority credits. *See* Cooper & Sobol, *supra* note 17, at 1602-03.

48. *Quarles*, 279 F. Supp. at 514.

49. *Id.* at 517.

50. *Id.* at 517-18. The court added that the system could not be justified by any showing of business necessity, since the employer's need could be met by rejecting unqualified candidates for promotion. *See id.* at 518.

51. *Id.* at 516. The cases that follow *Quarles* are collected in Note, *Last Hired*, *supra* note 17, at 1554-55 n.5; Note, *supra* note 8, at 526 n.17. In Local 189, Papermakers & Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), Judge Wisdom adopted a similar view:

> Title VII . . . prohibits discrimination in all aspects of employment. In this case we deal with one of the most perplexing issues troubling the courts under Title VII: how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination. May an employer continue to award formerly "white jobs" on the basis of seniority attained in other formerly white jobs, or must the

### C. Griggs *and the Impact Doctrine—Liability Without Fault*

Following the early case law on the seniority question, a development of tremendous significance occurred in Title VII doctrine with the Supreme Court's decision in *Griggs v. Duke Power Co.*[52] The *Griggs* theory of disparate impact discrimination, invalidating employment practices that have an adverse effect on protected group members even if the employer has no demonstrable purpose to discriminate, seemed to support both the reasoning and result of *Quarles*.

*Griggs* involved a challenge to Duke Power's use of general intelligence tests and a high school diploma requirement to select candidates for certain jobs. The statistics showed that a substantially higher proportion of blacks than whites would be rejected on the basis of the screening requirements, but there was no evidence indicating that the employer had adopted the requirements with the intent to cause this effect.[53]

The Supreme Court, in a unanimous decision authored by its new Chief Justice, held that Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible classification."[54] Chief Justice Burger continued:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[55]

The Court noted that the evidence failed to establish a "demonstrable relationship" between the screening requirements, which excluded disproportionate numbers of blacks, and the jobs in question. The lower court's finding that they were adopted without any "intention to discriminate against Negro employees" was not determinative. The Court explained:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built in headwinds" for minority groups and are unrelated to measuring job capability . . . [because] Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the

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employer consider the employee's experience in formerly "Negro jobs" as an equivalent measure of seniority? We affirm the decision of the district court. We hold that Crown Zellerbach's job seniority system in effect at its Bogalusa Paper Mill prior to February 1, 1968, was unlawful because by carrying forward the effects of former discrimination practices the system results in present and future discrimination. When a Negro applicant has the qualifications to handle a particular job, the Act requires that Negro seniority be equated with white seniority.

*Id.* at 982-83.

52. 401 U.S. 424 (1971).

53. *See id.* at 425-26, 432.

54. *Id.* at 431.

55. *Id.*

motivation.[56]

The Court decided *Griggs* after expressly recognizing that section 703(h) authorizes the use of "any professionally developed ability test" that is not "designed, intended or used to discriminate because of race."[57] The Court gave short shrift to this apparent "intent" requirement by reading its legislative history to require that a test, to come within the exemption, must be job-related; if not, the test must fall regardless of the employer's intent or purpose.[58]

*Griggs* represented a turning point in the way the Court viewed discrimination. Chief Justice Burger's opinion, by identifying "inferior education in segregated schools"[59] as the reason why the plaintiffs would be disproportionately harmed by the screening devices in question, recognized the broad societal causes of employment discrimination.[60] By focusing on "the *consequences* of employment practices, not simply the motivation,"[61] the Court acknowledged that minorities were being systematically disadvantaged even in situations in which the employer had no specific desire to cause that result, or at least when no such desire could be proved in court. If minorities could challenge only those practices in which the employer left behind a trail of evidence of animus, the Court seemed to be saying, the congressional objective to achieve equality of employment opportunities would remain an empty dream.[62]

Impact theory has developed after *Griggs* into a well-established and independent avenue of challenge to any selection practice that has a disparate impact on a protected group and cannot be shown to be job-related or business justified. Requirements subject to challenge include education and experi-

56. *Id.* at 432. Thus, the Court adopted a functional equivalent of race analysis: if the selection criteria excludes disproportionate numbers of minorities and is not related to productivity, then it is the functional equivalent of an overt racial criteria and should be prohibited. *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-40 (1971). As Professor Schnapper has noted, unless such covert discrimination is prohibited, it could provide the pretext for overt discrimination; that is, the decisionmaker could devise a neutral rule with the same impact as direct exclusion. *See* Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31, 49 (1982).

57. *Griggs*, 401 U.S. at 433, 436.

58. *Id.* at 431.

59. *Id.* at 430.

60. As one writer has observed: "Given the tragic history of relations between the races in this country, nearly all current uneven impact may ultimately be traceable to prior official discrimination." Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 54 (1977).

61. *Griggs*, 401 U.S. at 432.

62. In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. Experience has shown this to be false.

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

S. REP. No. 415, 92nd Cong., 1st Sess. 5 (1971); H.R. REP. No. 238, 92d Cong., 1st Sess. 8 (1971).

ence, minimum height or weight, and physical strength tests.[63] The Supreme Court has summarized the two different types of discrimination proscribed by Title VII:

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.
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> . . . .
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> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory.[64]

The *Griggs* doctrine is really a form of liability without fault, or strict liability.[65] The employer's conduct is held to violate the law not because the discriminatory effect is intentional, reckless, or negligent. Rather, the employer

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63. *See* B. SCHLEI & P. GROSSMAN, *supra* note 35, at 13; C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 16 (1980). As Professor Bartholet has observed:

> The impact doctrine has been an enormously powerful weapon for plaintiffs, because it removes any necessity to prove illicit motive on the employer's part, and because the burden of proof placed on the employer to show job relatedness has turned out to be very difficult to satisfy.

Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Bd. of Govenors v. Aikens, 70 CALIF. L. REV. 1201, 1203 (1982).

64. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Impact theory is presently in disfavor with the Reagan Admininstration, which has spoken out against its application. *See* Bartholet, *supra* note 63, at 1204 n.12.

65. As Professor Epstein noted:

> The development of the common law of tort has been marked by the opposition between two major theories. The first holds a plaintiff should be entitled, prima facie, to recover from a defendant who has caused him harm only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm. The alternative theory, that of strict liability, holds the defendant prima facie liable for the harm caused whether or not either of the two further conditions relating to negligence and intent is satisfied.

Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 152 (1973). *See generally* R. RABIN, PERSPECTIVES ON TORT LAW (2d ed. 1983).

The historical genesis and progression of the two standards has generated much scholarship and debate. *See* Epstein, *supra*; Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972); Posner, *Strict Liability: A Comment*, 2 J. LEG. STUD. 205 (1973); Rabin, *The Historical Development of Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981). The traditional view of legal historians has been summarized by Posner:

> Until the nineteenth century a man was liable for harm caused by his accidents whether or not he was at fault; he acted at his peril. The no-fault standard of liability was relaxed in the nineteenth century under the pressure of industrial expansion and an individualistic philosophy that could conceive of no justification for shifting losses from the victim of an accident unless the injurer was blameworthy (negligent) and the victim blameless (not contributorily negligent).

is liable because his conduct caused harm to a protected group of employees and was not justified by a business necessity.[66] Lack of discriminatory motive, or even the presence of good faith is no defense. The Court has rejected any subjective test of state of mind and opted for an objective test based on statistical impact. As with the development of no-fault liability in other areas, the effects test reflects the perceived need for a system of remedies without the expense (to claimants and the judicial system) of establishing fault.[67]

*Quarles* had prophetically applied impact theory to a seniority system that "neutrally" produced disparate results. In support of *Quarles*'s reasoning, Professors Cooper and Sobol wrote:

> [S]eniority and testing violate fair employment laws in situations where an adverse racial impact is not adequately justified, without regard to the motive of the employer in adopting the practices. This shift away from a restrictive focus on the state of mind of the employer is essential to the effective enforcement of fair employment laws, not merely because specific intent is difficult to prove, but because there is frequently no discriminatory intent underlying the adoption of seniority and testing practices, or a wide variety of other objective and apparently neutral conditions to hire and promotion. These conditions are possibly the most important contemporary obstacles to the employment and promotion of qualified black

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Posner, *A Theory of Negligence*, *supra*, at 29.

As an observer suggested at the turn of the century:

> The early law asked simply, "Did the defendant do the physical act which damaged the plaintiff?" The law of today, except in certain cases based upon public policy, asks the further question, "Was the act blameworthy?" The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril.

Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908), *quoted in* Epstein, *supra*, at 153. *See also* Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1930), and Remington & Helstad, *The Mental Element in Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 648-52, tracing the similar development of fault notions in criminal law.

Professor Rabin rejects this historical view. He concludes that the preindustrial era was dominated instead by a "no-liability," rather than strict liability, principle, which was carried over from property law concepts of status and immunity. *See* Rabin, *supra*, at 927, 959. He contends that the fault notions developed during the industrial era actually *expanded*, rather than contracted, the scope of liability. *Id.* at 928, 960. Rabin further concludes that during the supposed heyday of fault liability, in the 19th century, many unintended harms were governed by principles other than fault, such as status notions of trespasser and invitee, which determined the appropriate standard of care. *Id.* at 933, 945.

It does appear uncontraverted that the earliest civil action in English law, trespass, was not based on any notion of fault—the essence of the action was that the defendant had voluntarily committed some affirmative act which caused a direct and immediate injury to the plaintiff, *e.g.*, assault and battery. Therefore, liability was strict. The action on the case, which developed later, required proof of defendant's fault, *i.e.*, that his conduct was illegal, intentionally wrongful, or unreasonably dangerous. *See* Epstein, *supra*, at 187.

It is this author's belief that the case law development of standards and doctrine under Title VII should be informed by the experience in the more established bodies of doctrine, particularly tort. *See* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); *see also infra* note 145 and accompanying text.

66. While some might argue that the use of a screening device that adversely affects minorities and is not justified by business reasons raises an inference of discriminatory motive, neither motive, intent, or even negligence (*i.e.*, continuing a practice that unnecessarily screens out minorities) is an element of a *Griggs*-based claim. *See supra* note 64 and accompanying text.

67. *See infra* note 218 and accompanying text.

workers.[68]

Later, however, when the Supreme Court ruled on the seniority question, it interpreted section 703(h) to preclude the application of the impact theory to seniority challenges.

### D. Franks, Teamsters, *and* Evans—*The Formulation of the Intent Requirement*

The Supreme Court did not address the seniority question until it decided *Franks v. Bowman Transportation Co.*,[69] several years after *Quarles*. *Franks* was a Title VII class action alleging that the employer and union had engaged in racially discriminatory hiring, transfer, and discharge policies. The district court found that the employer had, after the effective date of Title VII, unlawfully excluded minority persons from the favored over-the-road (OTR) positions, and that the collective bargaining agreement perpetuated this discrimination through the use of its unit seniority system. The case went to the Supreme Court on the question whether the victims of the discrimination (both those whose applications had been rejected and those who had been hired but were steered into the less desirable jobs) could obtain seniority relief under Title VII.

The Court held that section 703(h) does not bar seniority relief for those victims of post-Act discrimination who, but for the discrimination, would have enjoyed the seniority status now sought.[70] Writing for the Court, Justice Brennan observed that plaintiffs' underlying claim was not the operation of a discriminatory seniority system, but instead was the discriminatory initial hiring system; and the relief sought was not directed at modifying or abolishing the seniority system, but only at an award of constructive seniority to compensate for the past hiring discrimination.[71] Section 703(h), to the Court, was a provision defining unlawful employment practices, and not a provision limiting the relief that could be awarded once an unlawful practice was found.[72] After reviewing its legislative history, Justice Brennan wrote:

> [T]he 'thrust' of [§ 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire.[73]

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68. Cooper & Sobol, *supra* note 17, at 1670-71.
69. 424 U.S. 747 (1976).
70. *Id.* at 757-62.
71. *Id.* at 758.
72. *Id.* at 758-59.
73. *Id.* at 761-62. As Justice Powell put it in his separate opinion, the " 'thrust' of [§ 703(h)]

The Court noted that seniority status at Bowman determined competitive position in layoff and recall, as well as in assignments and benefits like the length of vacation and size of pension payments. Indeed, the Court recognized generally that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this nation."[74]

> Without an award of seniority dating from the time when he was discriminatorily refused employment, an individual who applies for and obtains employment as an OTR driver pursuant to the District Court's order will never obtain his rightful place in the hierarchy of seniority according to which these various employment benefits are distributed. He will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors.[75]

The award of constructive seniority for any particular individual was left in "the sound equitable discretion of the district courts."[76] Thus, following a determination of classwide liability, the trial court would conduct a hearing to determine which members of the class were actual victims of the practice—were qualified applicants for available positions during the period of the violations.[77]

Interestingly, the Supreme Court's first treatment of the seniority question under Title VII did not discuss the "intention to discriminate" proviso of section 703(h). The *Franks* Court apparently was able to avoid having to construe that provision by categorizing the seniority issue before it as a remedial one—given a past hiring violation, could the victim be awarded constructive

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is the validation of seniority plans in existence on the effective date of Title VII." *Id.* at 791 (Powell, J., concurring in part and dissenting in part).

74. *Id.* at 766.

75. *Id.* at 767-68. The Court noted that "the issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination." *Id.* at 768 n.28.

The Court explicitly rejected Bowman's argument that seniority relief was inappropriate because such relief diminishes the expectations of innocent white employees, observing that "there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination." *Id.* at 774. The Court further emphasized that a grant of retroactive seniority to victims did not amount to a complete overhaul of the seniority system or to a deprivation of the seniority status of white employees, but only a modification of the system and the placing of victims into seniority slots in which they would have been but for the discrimination. The Court characterized its decision as one that divided the burden of past discrimination in hiring among discriminatee and nondiscriminatee employees, leaving the issue of the extent to which this burden might ultimately be placed on *the wrongdoer*—the employer—to a further date. *Id.* at 777 n.38.

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. The Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public interest.

*Id.* at 778.

76. *Id.* at 770.

77. *Id.* at 772. The burden of proof at this individual remedy stage was placed on the employer. *Id.*

seniority? It should be noted, however, that the original hiring violations before the Court were intentional, not merely impact, violations.

In *International Brotherhood of Teamsters v. United States*,[78] decided the following year, the Court for the first time considered the "intent" proviso. The Department of Justice had brought an action under Title VII against a nationwide motor freight carrier and the union representing many of its employees. The government's basic allegations, as in *Franks*, were that the company had engaged in a pre- and post-Act pattern and practice of intentional discrimination against black and Spanish-surnamed applicants by steering them into low-paying local city driver positions, and that the collective bargaining agreements locked in the effects of this past discrimination through a unit seniority system which provided that a local city driver who transferred to a line driver job lost all the seniority he had accumulated in the previous unit. The government sought relief that, among other things, would permit discriminatees to transfer to line driver jobs with full company seniority. Both the district court and court of appeals sustained the government's allegations of pre- and post-Act hiring discrimination and further held that the seniority system violated Title VII by perpetuating the discrimination. Concerning the seniority system, the district court issued injunctive relief permitting minority employees to transfer accumulated seniority within the company. The company and union also were generally enjoined from committing further violations, thus putting in issue "the legality of the seniority system" itself.[79]

The Supreme Court agreed that the government had proved systemwide and purposeful racial steering before and after the effective date of Title VII. Thus, under *Franks*, identifiable *post*-Act discriminatees were entitled to retroactive seniority. The perpetuation of *pre*-Act hiring discrimination, however, was held not to violate Title VII because section 703(h) reflected "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act."[80] Therefore, pre-Act discriminatees were not entitled to seniority relief. The seniority system was held protected by section 703(h); thus, the union's agreement to create and maintain the system did not violate Title VII, as had been held below.

Justice Stewart, writing for the Court, explained:

> Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the largest tenure are without exception white, the advantages of seniority system flow dis-

78. 431 U.S. 324 (1977).
79. *Id.* at 348 n.30.
80. *Id.* at 353.

> proportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantage does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.[81]
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> . . . .
>
> It is apparent that § 703(h) was drafted with an eye toward meeting the earlier criticism on this issue [of seniority] with an explicit provision embodying the understanding and assurances of the Act's proponents namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act.[82]

Moreover, since post-Act discriminatees were entitled to retroactive seniority on an individual basis, the Court reasoned that declaring this seniority system unlawful served no purpose, since "such a holding would in no way enlarge the relief to be awarded."[83]

The Court then turned its attention to the question of *which* seniority systems were entitled to immunity from a *Quarles* type challenge, specifically to section 703(h)'s requirements that the system be "bona fide" and that any differences in treatment not be "the result of an intention to discriminate because of race." The Court adopted a standard focusing on the racial neutrality of the purpose behind the seniority system. The Court rejected the government's

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81. *Id.* at 349-50.

82. *Id.* at 352.

83. *Id.* at 348 n.30. The Court's equating of individual constructive seniority with systemic injunctive relief directed against the seniority system itself overlooks the apparent significant differences between the two. The former amounts to tinkering with the system to slot in those persons who were subjected to post-Act discrimination, filed timely charges against that discrimination, *see* United Air Lines v. Evans, 431 U.S. 553 (1977), discussed *infra* notes 92-100 and accompanying text, and now seek a position with the offending employer for which constructive seniority would be beneficial. The systemic remedy, of course, provides the court much more flexibility in revising seniority practices to undo the effects of post-Act discriminatory policies. *Cf. Teamsters*, 431 U.S. at 361 n.47.

The cumbersome nature of the individual remedy was recognized by the Court in *Teamsters*:

> The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, " 'recreate the conditions and relationships that would have been had there been no' " unlawful discrimination. This process of recreating the past will necessarily involve a degree of approximation and imprecision.

*Id.* at 371-72 (quoting *Franks*, 424 U.S. at 769). And that is not the end of the road because "after the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interest of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Id.* at 372. Thus the *Franks* individual remedy is not an automatic one. *See, e.g.*, Romasanta v. United Air Lines, 717 F.2d 1140, 1150-51 (7th Cir. 1983) (denying victims full retroactive competitive seniority because of the "unusual adverse impact" it would have on incumbents).

arguments that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide" and that any seniority system which perpetuates past discrimination by definition causes differences in treatment that are "the result of an intention to discriminate."[84] The system at bar was deemed bona fide because it applied to all races and ethnic groups; to the extent it locked employees into their jobs, it locked *all* employees (black and white) into those jobs; the establishment of separate bargaining units was rational, in accord with industry practice, and consistent with National Labor Relations Board (NLRB) precedent; the system did not have its genesis in racial discrimination; and it was negotiated and had been maintained free from any illegal purpose.[85]

Justices Marshall (joined by Justice Brennan) filed a separate opinion in which he dissented from the majority's treatment of the seniority question. In his view, section 703(h) did not immunize seniority systems that perpetuated the effects of either pre- or post-Act discrimination. The dissent noted that the differences in treatment produced by the seniority system at bar were

> precisely the result of prior, intentional discrimination in assigning jobs; but for that discrimination, Negroes and Spanish-surnamed Americans would not be disadvantaged by the system. Thus, if the proviso is read literally, the instant case falls squarely within it, thereby rendering § 703(h) inapplicable. To avoid this result the Court is compelled to reconstruct the proviso to read: provided that such a "seniority system" did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose."[86]

Justice Marshall found nothing in the legislative history of Title VII to "warrant this radical reconstruction of the proviso."[87] In his view, "the legislative history of the 1964 Civil Rights Act does not support the conclusion that Congress intended to legalize seniority systems that perpetuate discrimination, and administrative and legislative developments since 1964 positively refute that conclusion."[88] As the dissent saw it: "Congress was concerned with seniority expectations that had developed prior to the enactment of Title VII, not with expectations arising thereafter to the extent that those expectations were dependent on whites benefiting from unlawful discrimination."[89] These conclusions were based in part on "the devastating impact of today's holding validating such systems"; in effect it "write[s] off an entire generation of minority group employees" and "postpone[s] for one generation the achievement of economic equality."[90] Congress, it was suggested, could not have intended this result.

84. *Teamsters*, 431 U.S. at 353 & n.38.
85. *Id.* at 355-56.
86. *Id.* at 382 (Marshall, J., concurring in part, dissenting in part).
87. *Id.* (Marshall, J., concurring in part, dissenting in part).
88. *Id.* at 383 (Marshall, J., concurring in part, dissenting in part).
89. *Id.* at 384 (Marshall, J., concurring in part, dissenting in part).
90. *Id.* at 387-88 (Marshall, J., concurring in part, dissenting in part).

*Teamsters* thus provides two conflicting interpretations of the "intention to discriminate" proviso of section 703(h). The dissent's reading refers back to the *original* act of discrimination that the seniority system perpetuates, and inquires whether that act was "intentional." If it was, the differences in treatment through the operation of the system are "the result of an intention to discriminate," and thus section 703(h) does not immunize the system.[91] The majority, on the other hand, reads the intent requirement of the proviso as referring to the seniority system *itself*, and inquires whether the system represents a racially-motivated decision on the part of its creators.

*United Air Lines, Inc. v. Evans*[92] extended further the protection of seniority systems that perpetuate the effects of past discrimination. The action was brought by a flight attendant who had been employed by United from 1966 to 1968. During this period, United maintained a policy of refusing to allow married women to serve as flight attendants.[93] Therefore, when Evans married in 1968, she was forced to resign. The no-marriage policy was subsequently challenged and held unlawful under Title VII,[94] but Evans was not a party to that action and did not initiate her own action against United at the time. Evans successfully sought re-employment with United in 1972, but for seniority purposes she was treated as a new employee, with no credit for her prior service.[95] When United refused her requests to credit her pre-1972 seniority, she filed her Title VII action.

Evans argued that the seniority system as applied to her gave present effect to the past post-Act illegal practice and thus was itself unlawful. The Supreme Court agreed that the past discriminatory conduct was indeed still haunting Evans, but affirmed the dismissal of the case on the ground that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."[96] Therefore, under the *Teamsters* doctrine, the perpetuation of such discrimination was immunized from challenge under section 703(h). "United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination" within the statutory time period.[97]

The Court added that United's seniority system denied seniority credit for prior service to both males and females who had resigned or were terminated, and thus was "neutral in its operation."[98] Thus Evans had failed to establish, pursuant to section 703(h), either that the seniority system was not bona fide or that it was intentionally designed to discriminate because of sex.

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91. It is unclear how the dissenters would treat an original *impact* violation, *e.g.*, the unintentional use of a nonvalidated examination, that was perpetuated by a seniority system.

92. 431 U.S. 553 (1977).

93. *Id.* at 554.

94. Sproges v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

95. *Evans*, 431 U.S. at 555.

96. *Id.* at 558.

97. *Id.* "A contrary view," the Court noted, "would substitute a claim for seniority credit for almost every claim which is barred by limitations." *Id.* at 560.

98. *Id.* at 558. This observation ignores, of course, the nonneutrality of the no-marriage rule, which forced out only females, and not males.

The dissent noted that:

> But for her sex, respondent Carolyn Evans presently would enjoy all of the seniority rights that she seeks through this litigation. Petitioner United Air Lines has denied her those rights pursuant to a policy that perpetuates past discrimination by awarding the choicest jobs to those possessing a credential married women were unlawfully prevented from acquiring: continuous tenure with United.[99]

Justices Marshall (joined by Justice Brennan) reiterated his view, expressed in *Teamsters*, that section 703(h) does not immunize seniority systems that perpetuate *post*-Act discrimination. In his opinion, "The consequence of Ms. Evans' failure to file charges after she was discharged is that she has lost her right to backpay, not her right to challenge present wrongs."[100]

After *Franks*, *Teamsters*, and *Evans*,[101] plaintiffs could attack seniority systems on a class-wide basis, and thus obtain systemic relief, only by showing

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99. *Id.* at 560-61 (Marshall, J., dissenting).

100. *Id.* at 562 n.2 (Marshall, J., dissenting).

101. Other Supreme Court decisions dealt with the seniority question under Title VII in a more summary fashion. Trans World Airlines v. Hardison, 432 U.S. 63 (1977), involved a claim of religious discrimination based on the employer's and union's refusal to permit the plaintiff to avoid work on his Sabbath. Shift assignments were controlled by seniority, and plaintiff's request for reassignment would have required a modification of the seniority provisions of the collective bargaining agreement. The Supreme Court upheld plaintiff's termination for refusing to work his designated shift, rejecting his Title VII claim with the observation that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82.

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), involved a practice that required pregnant employees to take a leave of absence without sick pay and with loss of all accumulated seniority. Sick pay and seniority retention were available for disabilities other than pregnancy. The loss of seniority meant that Satty could return to her position only if no incumbent employee also sought it. The Court held that the seniority practice as applied to pregnant employees violated Title VII, reasoning that it had a discriminatory effect on females, was not justified by a business necessity, and thus ran afoul of *Griggs*. The Court seemed untroubled by § 703(h), which it failed to discuss despite the obvious issues raised under the section. The omission may have occurred because the claim was not that past discrimination was perpetuated by a neutral rule, but, rather, that the seniority rules were explicitly gender-related, and thus not within the § 703(h) exemption. *See* Zimmer, *supra* note 42, at 95-96.

Zipes v. Trans World Airlines, 102 S. Ct. 1127 (1982), was a successful challenge to the airline's practice of grounding female flight attendants who became mothers while permitting male attendants who became fathers to continue flying. Over the objection of the union, which had not itself been found guilty of discrimination, the Court affirmed a settlement decree awarding seniority relief to identifiable victims of the discrimination. The Court held that a finding that the union had engaged in discrimination was not necessary for such an award.

Ford Motor Co. v. EEOC, 102 S. Ct. 3057 (1982), involved a discriminatory refusal to hire women for particular positions. After charges were filed with the Equal Employment Opportunity Commission (EEOC), Ford offered the victims the jobs they had sought, but without seniority retroactive to the date of refusal. The women did not accept the jobs. When the Title VII case was litigated in court, and Ford lost, it argued that the women were not entitled to recover backpay accruing after the dates on which the offers of employment had been declined. The Supreme Court agreed, holding that an employer can toll the continuing accrual of back pay liability by offering the claimant the job that had been denied, even though retroactive seniority is not part of the offer. Justice O'Connor, writing for the Court, suggested that this rule would encourage voluntary settlement of these disputes while at the same time avoiding "the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents who have earned their places through their work on the job." *Id.* at 3064. In light of the fact that "seniority plays a central role in allocating benefits and burdens among employees . . . , we should be wary of any rule that

that the system was set up as a part of a scheme to maintain a discriminatory workplace. In *Teamsters*, therefore, the unit seniority system survived scrutiny even though the almost total exclusion of minority employees from line-driver jobs could only have been maintained through the operation of that very system. Short of a showing of discriminatory purpose, seniority systems are subject only to modification by way of constructive seniority for identifiable victims of post-Act hiring violations, and then only when those violations were made the subject of timely charges by the victims. In a typical last hired-first fired case, in which reverse seniority layoffs operate to reduce the percentage of minority or female employees to pre-Act levels, such tinkering with the system will do little to protect the equal opportunity gains of recent years.[102]

### *E.* Pullman-Standard v. Swint *and* American Tobacco Co. v. Patterson—*The Parameters of Discriminatory Intent*

*Pullman-Standard v. Swint*[103] and *American Tobacco Co. v. Patterson*[104] represent a culmination of the debate on the seniority question and an elaboration of the Court's "intent" standard under section 703(h). *Patterson* raised the issue whether section 703(h) applied to seniority systems adopted *after* the effective date of Title VII. The Supreme Court, in a 5-4 split, answered in the affirmative,[105] thus extending the scope of the intent requirement. The facts before the Court presented the familiar assertion that past discrimination in hiring and assignment was being perpetuated by the use of seniority (here in the form of lines of progression that controlled advancement). Defendants contended that section 703(h) protected this seniority system unless there was a showing of discriminatory intent. The court of appeals held, however, that section 703(h) applied only to systems in existence on Title VII's effective date, and thus did not immunize these lines of progression, established years later, from an impact challenge. The Supreme Court noted that the plain language of section 703(h) applied to post-Act as well as pre-Act seniority systems, and rejected the view that the provision was intended merely as a grandfather clause to protect only those systems in existence at the time. Thus, "[t]o be

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encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." *Id.* at 3069-70.

W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum, & Plastic Workers, 103 S. Ct. 2177 (1983), presented the Court with a conflict between the seniority provisions of the collective bargaining agreement and those set out in a conciliation agreement the employer entered into with the EEOC to avoid Title VII liability. The liability would likely have resulted from a pattern of hiring discrimination and the perpetuation of its effects through the seniority system. The conciliation agreement suspended the bargained for reverse seniority layoff practice in favor of recently hired females, and the union challenged the practice in an action filed by the employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). Without reaching the question whether Title VII was implicated, *see W.R. Grace & Co.*, 103 S. Ct. at 2184 n.9, the Court ruled that the company could not voluntarily abrogate the collective bargaining agreement without the union's consent.

102. *See, e.g.*, Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated*, 103 S. Ct. 2076 (1983).

103. 102 S. Ct. 1781 (1982).

104. 102 S. Ct. 1534 (1982).

105. *Id.* at 1542.

cognizable, a claim that a seniority system has a discriminatory impact must be accompanied by proof of a discriminatory purpose."[106]

In the dissenters' view, plaintiffs challenging a seniority system adopted after the effective date of Title VII need only establish disparate impact in order to prevail.[107] They read section 703(h) as an effort to protect the seniority expectations of employees as they existed *prior to* the effective date of Title VII, not those expectations that developed after that date.[108] Justice Stevens filed a separate dissent in which he explained:

> The Court in this case . . . reads the "specific intent" proviso of § 703(h) as though it were intended to define the proper standard for measuring any challenge to a merit or seniority system. This reading of the proviso is entirely unwarranted. The proviso is a limitation on the scope of the affirmative defense. It addresses the problem created by pre-Act seniority systems, which of course were "lawful" because adopted before the Act became effective and therefore presumptively "bona fide" within the meaning of § 703(h). As the legislative history makes clear, Congress sought to protect seniority rights that had accrued before the effective date of the Act, but it did not want to extend that protection to benefits under seniority systems that were the product of deliberate racial discrimination. The obvious purpose of the proviso was to place a limit on the protection given to pre-Act seniority systems. The Court's broad reading of the proviso ignores both its context in § 703(h) and the historical context in which it was enacted.[109]

*Swint* followed the "prior discrimination plus departmental seniority" paradigm, although perhaps in an extreme form.[110] The district court concluded that the seniority system did not reflect an intention to discriminate because of race or color, and thus held that the system was protected under section 703(h). The court of appeals reversed, holding that the differences did result from intentional discrimination. The Supreme Court granted certiorari limited to the following questions:

> [W]hether a Court of Appeals is bound by the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a) in reviewing a District Court's findings of fact, arrived at after a lengthy trial as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the *bona*

106. *Id.* at 1538.

107. *Id.* at 1542 (Brennan, J., dissenting).

108. *Id.* at 1543-45 (Brennan, J., dissenting).

109. *Id.* at 1548 (Stevens, J., dissenting). Justice Stevens observed that applying the *Griggs* standard to post-Act seniority systems, as he was suggesting, would not necessarily sound their death knell, because systems with disparate impact may still by justified by a business necessity, *e.g.*, "the need to induce experienced employees to remain, to establish fair rules for advancement, or to reward continuous, effective service." *Id.*

110. "Prior to 1965, the Company openly pursued a racially discriminatory policy of job assignments," with blacks steered into the worst departments and jobs. *Swint*, 102 S. Ct. at 1785. Of the two unions at the plant, one had restricted itself to white members; the other had practiced segregation in its meetings and social functions. *Id.* at 1786.

*fides* of the seniority system.[111]

Answering both questions in the affirmative, the Court reversed and remanded.

The Court in *Swint* reaffirmed its commitment to a motive-focused intent standard for evaluating seniority challenges:

> Differentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by § 703(h) may be presumed from [discriminatory] impact. As § 703(h) was construed in *Teamsters*, there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system. That finding appears to us to be a pure question of fact.
>
> This is not to say that discriminatory impact is not part of the evidence to be considered by the trial court in reaching a finding on whether there was such a discriminatory intent as a factual matter. We do assert, however, that under § 703(h) discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent. Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a). Insofar as the Fifth Circuit assumed otherwise, it erred.[112]

Intent would be assessed through application of factors employed in *James v. Stockham Valves & Fittings Co*.[113] and originally suggested in *Teamsters*.[114] First, does the system operate to equally discourage all employees from transferring between seniority units? Second, is the departmental structure underlying the seniority system rational in light of the general industry practice? Third, did the seniority system have its genesis in racial discrimination, (*i.e.*, what is the relationship between the system and other racially discriminatory practices)? Finally, was the seniority system negotiated and maintained free from any illegal purpose?[115]

Justice Marshall (joined by Justice Blackmun) filed a dissenting opinion, taking issue with the majority's "proposition that section 703(h) of Title VII immunizes a seniority system that perpetuates past discrimination, as the system at issue here clearly does, simply because the plaintiffs are unable to demonstrate to this Court's satisfaction that the system was adopted or main-

111. *Id.* at 1783.

112. *Id.* at 1790-91 (footnotes omitted).

113. 559 F.2d 310 (5th Cir. 1977), *cert. denied.*, 434 U.S. 1034 (1978).

114. *See supra* text accompanying note 80.

115. *James*, 559 F.2d at 352.

tained for an invidious purpose."[116] "[P]lacing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates the clearly expressed will of Congress and effectively 'freeze[s] an entire generation of Negro employees into discriminatory patterns that existed before the Act.' "[117]

In addressing the nature of "intent" required to successfully challenge a seniority system, the dissenters read the majority opinion to hold "that a finding of discriminatory intent sufficient to satisfy *Teamsters* can be based on circumstantial evidence, including evidence of discriminatory impact."[118] They concurred with the court of appeals that there was "overwhelming evidence of discriminatory intent."[119] The seniority system locked blacks into the worst jobs, and this disproportionate impact contradicted any conclusion that the system operated neutrally to discourage all employees, black and white, from transferring to other departments—white employees would not need to transfer since they already were in the choice jobs. No rational explanation other than race explained the creation of segregated departments coincident with unionization. Furthermore, "considerations of race permeated the negotiation and adoption of the seniority system in 1941 and subsequent negotiations thereafter."[120]

### *F.* Guardians Association—*Extension of the Intent Requirement to Title VI Seniority Challenges*

In *Guardians Association v. Civil Service Commission*[121] the Court extended the requirement of proof of discriminatory purpose to a seniority challenge brought under Title VI of the Civil Rights Act of 1964,[122] which has no provision like section 703(h). The case involved a last hired-first fired layoff practice in the New York City Police Department. The original violation, found by the trial court years earlier, was the use of entry-level written examinations from 1968 to 1970 that had a discriminatory impact and were not job-

116. *Swint*, 102 S. Ct. at 1793 (Marshall, J., dissenting).

117. *Id.* (Marshall, J., dissenting) (quoting Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968)).

118. *Id.* at 1795 (Marshall, J., dissenting) (citation omitted).

119. *Id.* at 1797 (Marshall, J., dissenting).

120. *Id.* at 1798 (Marshall, J., dissenting) (quoting Swint v. Pullman-Standard, 624 F.2d 525, 532 (5th Cir. 1980), *rev'd*, 102 S. Ct. 1781 (1982)).

121. 103 S. Ct. 3221 (1983).

122. The operative provision of this title provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1976).

The § 703(h) standard has also been read into other civil rights laws as well. *See* Freeman v. Motor Convoy, Inc., 700 F.2d 1339 (11th Cir. 1983) (§ 1981); United States v. Trucking Management Co., 662 F.2d 36 (D.C. Cir. 1981) (Executive Order 11,246); Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975), *vacated and remanded*, 431 U.S. 951, *on remand* 559 F.2d 282 (5th Cir. 1977) (same).

related. Since appointments through 1974 were made in order of test score, minorities tended to be hired later than whites, and thus had less seniority. When the Department began layoffs in 1975, in reverse seniority order, minority officers filed another action and claimed this practice perpetuated the past discrimination.[123]

The challenge was premised primarily on Titles VI and VII, the former based on the distribution of federal funds to the Department. The district court, although finding no discriminatory intent behind the seniority practice, ruled in favor of plaintiffs.[124] The court reached only the Title VI claim,[125] and entered its decision before the Supreme Court's decision in *Teamsters*.

The Second Circuit Court of Appeals vacated and remanded after *Teamsters*.[126] On remand the district court ruled that *Teamsters* required it to modify its order since pre-Act (here pre-1972, the date the Act was applied to municipalities) discrimination perpetuated by a seniority system was immunized by section 703(h).[127] Officers hired prior to 1972 were thus not entitled to relief, and officers hired after that date could not be awarded constructive seniority going back before 1972. The court then looked to the Title VI claim, that statute having been applicable to municipalities since 1964, and held that proof of discriminatory intent was not necessary to establish a violation of Title VI. The trial court thus ordered a class-wide constructive seniority remedy for all minorities without regard to their date of hire.[128] On appeal, the Second Circuit affirmed the modified Title VII relief, but reversed the Title VI decision,[129] holding that the district court had erred in concluding that Title VI does not require proof of discriminatory intent.

On a writ of certiorari raising the question whether proof of discriminatory intent is necessary to establish a Title VI violation, the Supreme Court affirmed.[130] Writing for the plurality, Justice White concluded that "Title VI reaches unintentional, disparate impact discrimination as well as deliberate racial discrimination."[131] Yet he voted to affirm the Second Circuit's decision because he believed that without proof of discriminatory purpose, a plaintiff's remedies under Title VI are limited to prospective relief (injunctive and declaratory) and cannot include retroactive compensatory relief such as back pay or constructive seniority. In a footnote Justice White wrote:

123. 431 F. Supp. 526 (S.D.N.Y.), *vacated and remanded*, 562 F.2d 38 (2d Cir. 1977) (for reconsideration in light of *Teamsters*), *modified on remand*, 466 F. Supp. 1273 (S.D.N.Y. 1979), *aff'd and modified in part, rev'd in part*, 633 F.2d 228 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983).

124. *Id.* at 550-51.

125. The district court deemed it unnecessary to reach the Title VII claim. *Id.* at 530 n.2.

126. Guardians Ass'n v. Civil Serv. Comm'n, 562 F.2d 38 (2d Cir. 1977), *modified on remand*, 466 F. Supp. 1273 (S.D.N.Y. 1979), *aff'd and modified in part, rev'd in part*, 633 F.2d 228 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983).

127. Guardians Ass'n v. Civil Serv. Comm'n, 466 F. Supp. 1273 (S.D.N.Y. 1979), *aff'd and modified in part, rev'd in part*, 633 F.2d 228 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983).

128. *Id.* at 1287.

129. Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 228-69 (2d Cir. 1980), *aff'd*, 103 S. Ct. 3221 (1983).

130. Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983).

131. *Id.* at 3227.

> It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at the time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable "so as to have the opportunity of judging for himself as to the degree of this probability." And in tort law, usually only persons who have intentionally or recklessly violated another's rights are liable for punitive damages.[132]

In a dissenting opinion, Justice Marshall argued that "proof of discriminatory animus should not be required" in a Title VI action,[133] but went further than White by contending that compensatory relief (including retroactive seniority) could be awarded in the absence of such proof.

> [G]iven the need for an objective and administrable standard applicable to thousands of federal grants under Title VI, the "effects" test is far more practical than a test that focuses on the motive of the recipient, which is typically very difficult to determine.[134]

In another dissenting opinion, Justice Stevens (joined by Justices Brennan and Blackmun) concluded that Title VI requires a showing of invidious purpose, but that regulations promulgated pursuant to it that prohibited impact as well as intentional discrimination were nevertheless valid because they were not inconsistent with the Act's delegation of enforcement authority to federal agencies. As the dissent put it, "[A]lthough the Court has determined that Title VI does not *compel* the application of an effects standard, I do not believe that Congress should be understood to have *prohibited* regulations adopting such a standard."[135]

At first blush, *Guardians Association* seems to bring the status of seniority challenges under Title VI into precise conformity with the status of such challenges under Title VII: an intent rather than a mere effects showing is necessary to make out a case. Indeed, as Justice Powell reports, although "the Court is divided as to the standard of proof required to prove violations of

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132. *Id.* at 3230 n.20 (citations omitted) (quoting 5 A. Corbin, Corbin on Contracts § 1014 (2d ed. 1964)). Only Justice Rehnquist joined in this opinion. He agreed that plaintiffs were not entitled to seniority relief, but disagreed with Justice White that a violation of Title VI could be made without proof of discriminatory purpose. *Id.* at 3337.

Justice Powell filed a separate concurring opinion in which Chief Justice Burger joined. They asserted that there is no private right of action under Title VI. Alternatively, they would have affirmed on the grounds that a showing of intentional discrimination "is a prerequisite to a successful Title VI claim." *Id.* at 3235-37 (Rehnquist, J., concurring).

Justice O'Connor also filed a separate concurring opinion, concluding that proof of purposeful discrimination is a necessary element of a valid Title VI claim. *Id.* at 3237-39 (O'Connor, J., concurring).

133. *Id.* at 3239 (Marshall, J., dissenting).

134. *Id.* at 3243 (Marshall, J., dissenting) (footnote omitted). Marshall noted that in 1966 the House of Representatives rejected an amendment to limit Title VII's prohibition to intentional discrimination, and the same amendment died in a Senate Committee. *Id.* at 3241-42 (Marshall, J., dissenting).

135. *Id.* at 3255 n.17 (Stevens, J., dissenting) (citations omitted).

rights in cases involving Title VI," nevertheless "[s]even members of the Court agree that a violation of the statute itself requires proof of discriminatory intent."[136]

This agreement is illusory. Three of the seven members (Stevens, Brennan, and Blackmun) would hold that a violation of the *regulations* adopted pursuant to Title VI may be established by proof of discriminatory impact. These three justices, together with Justices White and Marshall, who conclude that a violation of the statute itself requires only a showing of disparate impact, comprise a majority that "would hold that proof of discriminatory effect suffices to establish liability . . . when the suit is brought to enforce the regulation rather than the statute itself."[137] Since every federal department is obliged to promulgate such regulations, and since these regulations uniformly proscribe impact discrimination (at least at present), this majority would seem to be critical for future decisionmaking. But even this breakdown is deceiving. Because Justice White would not permit an award of compensatory relief (which he defines to include constructive seniority as well as back pay) without a showing of discriminatory purpose, impact discrimination merely entitles the plaintiffs to prospective relief.[138]

It appears, then, that a 5-4 majority of the Court would oppose an award of individual constructive seniority in a Title VI challenge unless discriminatory purpose is established. Prospective injunctive and declaratory relief could, however, be awarded on a mere showing of disparate impact. It remains unclear whether this could include an injunction prospectively restructuring the seniority system, but that seems a distinct possibility.

Such systemic injunctive relief would be unavailable in a Title VII action without a showing of discriminatory purpose.[139] Oddly enough, the Title VII plaintiff (unlike his Title VI counterpart) *would* be able to obtain constructive seniority merely on a showing of unintentional perpetuation of post-Act discrimination.[140]

In fact, *Guardians Association* seems to present the anomolous situation that the relief available is significantly different in identical seniority challenges under Title VI and Title VII,[141] when proof of discriminatory motive is lacking. Indeed, the respective remedies are mirror images of one another. If

136. *Id.* at 3235 n.1 (Powell, J., concurring).

137. *Id.* (Powell, J., concurring).

138. Indeed, Justice Powell did not exaggerate when he wrote: "Our opinions today will further confuse rather than guide." *Id.* at 3235 (Powell, J., concurring).

139. *See supra* notes 78-120 and accompanying text.

140. *See supra* notes 69-77 and accompanying text.

141. The Supreme Court has adopted a broad definition of "seniority system" for the purpose of § 703(h). The majority in California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980), unwilling to restrict § 703(h)'s protection to rules relating merely to continuous length of service, held that a clause in the industry collective bargaining agreement that required a temporary employee to work at least 45 weeks in a single calendar year before becoming a permanent employee (and thus be accorded greater seniority benefits and layoff protection) was a "seniority system." *Id.* at 610-11. Thus, plaintiff's *Quarles*-type contention that the 45 week rule was perpetuating past discrimination by the employers and unions was deemed insufficient under Title VII. *Id.* at 605, 610-11. The Court remanded with instructions to determine whether the 45 week rule was "bona fide" or

nothing else emerges clearly from the blizzard of opinions in *Guardians Association,* it is apparent that the Justices continue to disagree significantly over the wisdom of applying a motive-centered standard to seniority challenges.[142]

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whether the differences in employment conditions that it produced were "the result of an intention to discriminate because of race" under § 703(h). *Id.* at 610-11.

The *Bryant* majority rejected the court of appeals' view that the 45 week rule "lacks the fundamental component of [a seniority] system," which is "the concept that employment rights should increase as the length of an employee's service increases." *Id.* at 604. The appellate court had pointed out that under the 45 week rule one employee could acquire permanent status after a total of only 45 weeks work, as long as they are in the same calendar year, while another employee could work for years and never attain permanent status because he never worked 45 weeks in any one year. *Id.*

The Supreme Court wrote that, in enacting § 703(h), "Congress in 1964 quite evidently intended to exempt from the normal operation of Title VII more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment." *Id.* at 607. The 45 week provision, which prescribed "when the seniority time clock begins ticking," was one such rule. *Id.*

The decision in *Bryant* may insulate a wide range of employment decisions not typically thought to involve "seniority systems" from an impact discrimination challenge. *See generally* Zimmer, *supra* note 42, at 91-99.

142. This may in part explain the Court's refusal to decide Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated and remanded*, 103 S. Ct. 2076 (1983), in which the First Circuit Court of Appeals affirmed an order suspending the statutorily mandated reverse seniority practice controlling the major reduction-in-force proposed for the Boston police and fire departments in 1981. A decade earlier, the courts had found these departments' hiring and testing practices to be discriminatory in their effect and not job-related. Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974). The federal district court explicitly determined, however, that these were unintentional violations. Castro v. Beecher, 334 F. Supp. 930, 934, 944, 948 (D. Mass. 1971), *aff'd in part, rev'd in part*, 459 F.2d 725, 727 (1st Cir. 1972); Boston Chapter, NAACP, v. Beecher, 371 F. Supp. 507, 510, 514, 515, 519-20 (D. Mass.), *aff'd*, 504 F.2d 1017, 1021 (1st Cir. 1974). The district court in *Castro* did find, however, that the exam was so woefully non-job-related that its "discriminatory consequences" were "foreseeable by sophisticated persons." *Castro*, 334 F. Supp. at 943. The consent decrees entered provided for a minority preference in certification off civil service lists, and, by 1981, minority representation in both departments increased dramatically, to 11.7% in the police department and 14.7% in the fire department. *Boston Chapter, NAACP*, 679 F.2d at 970. The layoffs proposed in 1981 would have cut these numbers approximately in half. *Id.*

The challenge to the proposed layoffs was premised on a perpetuation of past discrimination theory; there was no showing that the seniority system itself was designed to harm minorities. The court of appeals affirmed an order by the district court enjoining the departments from reducing the percentage of minority officers through the layoff program; the employers could *not* implement a last hired-first fired procedure. *Id.* at 968, 971, 978. Unlike the remedy approved in *Franks*, this was not an individual plaintiff-by-plaintiff award of constructive seniority, requiring a hearing on each claim. Rather, this represented systemic modification of the seniority system as it controlled reductions-in-force. Indeed, the minority officers who benefited from this class-wide remedy included persons who were not even themselves victims of the original discrimination—persons who had not applied for their positions until years after the challenged examinations had been discontinued. *Id.* at 976. The order, therefore, went significantly beyond the kind of seniority relief to identifiable victims of post-Act discrimination that the Supreme Court had previously indicated was permissible within the bounds of § 703(h).

The court of appeals premised its decision primarily on the inherent power of the district court to revise its original remedial consent order, which established a minority preference, in light of Boston's unforeseen financial crisis. *Id.* at 971-73. It reviewed *Franks*, *Teamsters*, and *American Tobacco* and found "nothing in this trilogy that precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system." *Id.* at 974. The court reached this conclusion despite its recognition that neither the original hiring discrimination nor the seniority system itself were motivated by discriminatory purpose, at least as reflected by the evidence of record. *Id.* at 971.

The Supreme Court granted certiorari to address the police and firefighters unions' argument

## II. THE IMPLICATIONS OF A MOTIVE-CENTERED STANDARD FOR SENIORITY CHALLENGES

As developed in the previous section, the Supreme Court has interpreted the ambiguous language and legislative history of Title VII to establish a motive-centered intent standard for classwide challenges to seniority systems that adversely affect minority employees. This standard immunizes seniority-based decisionmaking unless the court is satisfied that the system has been adopted or maintained *because* of its discriminatory impact, and not merely in spite of it. The intent requirement is applicable to systems set up both before and after the effective date of the Act. The only room for judicial intervention, short of a showing of discriminatory motive, is under the *Franks* doctrine—that identifiable victims of post-Act discrimination can seek retroactive seniority to the date they would have been hired or assigned but for the discrimination.

This section explores the nature of this specific intent standard, which departs from the effects test generally applicable in Title VII litigation.[143]

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that "[a]n injunction against application of [the Massachusetts civil service reverse seniority statute] . . . could 'lie only if the requirement of § 703(h)—that such application be intentionally discriminatory—were satisfied.' " Brief on the Merits for Petitioner Boston Firefighters Union, Local 718 at 14-15, *Boston Chapter, NAACP*, 103 S. Ct. 2076 (1983); *see also* Brief for the Petitioner Boston Police Patrolmen's Association at 13-15, *Boston Chapter, NAACP*, 103 S. Ct. 2076 (1983); Brief for the State Petitioners at 55-60, *Boston Chapter, NAACP*, 103 S. Ct. 2076 (1983). After briefing and oral argument, however, the Court remanded the case for a determination of possible mootness on the basis of a Massachusetts statute that provided for the reinstatement of all officers laid off and granted them special seniority status which protected them from such lay offs in the future. Boston Chapter, NAACP v. Beecher, 103 S. Ct. 2076 (1983). On remand, the court of appeals held the case was moot. Boston Chapter, NAACP v. Beecher, 716 F.2d 931 (1st Cir. 1983).

The Court is presently considering a case that raises essentially identical issues as *Beecher*. *See* Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, 103 S. Ct. 2451 (1983).

143. *See supra* notes 52-67 and accompanying text. Liability without fault is the rule for the award of back pay under the statute as well. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (lack of evidence of bad faith is not permissible ground for denial of back pay award once violation found).

Another area of Title VII litigation in which the impact theory also appears unavailable to plaintiffs involves unequal pay claims. *See* County of Wash. v. Gunther, 452 U.S. 161 (1981) (plaintiffs could pursue claim of "intentional" depression of their wages because of gender, but implied that nonintentional claims were foreclosed).

Proof of specific intent to discriminate is not a necessary element to establish a violation of the Equal Pay Act, 29 U.S.C. § 206(d) (1982), *see* B. SCHLEI & P. GROSSMAN, *supra* note 35, at 436-42; the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982), *see* Cooper & Sobol, *supra* note 17, at 1676 n.24; or the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1981). *See also* Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); Note, *The Meaning of "Willful" Under the Liquidated Damages Provision of the Age Discrimination in Employment Act*, 68 IOWA L. REV. 333 (1983) [hereinafter cited as Note, *The Meaning of "Willful"*]; Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982). Such proof would only be relevant to the question of damages or the appropriate statute of limitations. *See* B. SCHLEI & P. GROSSMAN, *supra* note 35, at 440; Note, *The Meaning of "Willful," supra*. Nor is specific intent required to make out a violation of truth-in-lending or fair labelling laws. *See* Cooper & Sobol, *supra* note 17, at 1676 n.24.

The situation is more complicated in National Labor Relations Act cases brought under § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), where the debate over motive versus impact continues. *See generally* Christensen & Svanoe, *Motive and Intent in Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); DuRoss, *Toward Rationality in Discriminatory*

First, the standard is analyzed in comparison to standards controlling in certain other doctrinal areas to place it in a broader perspective. Second, the lower courts' application of the intent requirement to seniority challenges is studied. Last, the implications of the motive-centered inquiry, both from a policy and a litigation standpoint, are considered.

### *A. A Comparative Perspective*

The motive-centered intent requirement of *Teamsters* and its progeny appears to be the same standard applied in constitutional law discrimination cases since *Washington v. Davis,*[144] but it represents a departure from notions of intent in the tort area, to which the Supreme Court has frequently looked as a model for civil rights case adjudication.[145]

*Davis* dealt with the validity of a written test given to police officer applicants. Minorities challenged the exam as discriminatory under the equal protection clause; they established that a disproportionate number of blacks (four times as many) as compared to whites failed the exam and that it had not been validated as substantially related to job performance. There was no claim of purposeful discrimination. The court of appeals applied a *Griggs* analysis and ruled in favor of plaintiffs.[146] The Supreme Court reversed, holding that proof of discriminatory purpose is a necessary element of a discrimination claim brought under the Constitution.[147] The Court added:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain

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*Discharge Cases*: *The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA*, 66 GEO. L.J. 1109 (1978); Note, *Collective Bargaining Over Plant Relocation Decisions*: *Let's Make a Deal*, 18 NEW ENG. L. REV. 715, 724 (1982).

144. 426 U.S. 229 (1976). This line of cases will only be summarized here. For a thorough discussion, see Note, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725 (1977). One writer has concluded that the *Teamsters* intent standard is identical to that of *Davis*. *See* Schnapper, *supra* note 56, at 57 n.97.

145. *See, e.g.*, Smith v. Wade, 103 S. Ct. 1625 (1983); Briscoe v. LaHue, 103 S. Ct. 1108, 1128 n.19 (1983); Carey v. Piphus, 435 U.S. 247 (1978); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Curtis v. Loether, 415 U.S. 189, 195 n.10 (1974); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969); Monroe v. Pape, 365 U.S. 167 (1961).

Indeed the Court recently has advocated the incorporation of modern tort concepts into § 1983 case law. *See* Smith v. Wade, 103 S. Ct. 1625, 1628 n.2 (1983). Quoting Cavey v. Piphus, 435 U.S. 247, 257-58 (1978), the *Wade* Court observed:

> "[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well."

*Wade*, 103 S. Ct. at 1629 n.2.

146. Washington v. Davis, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

147. Washington v. Davis, 426 U.S. 229, 238-39 (1976).

> on nonracial grounds . . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.[148]

The Supreme Court consistently has reaffirmed the *Davis* principle, requiring a showing of discriminatory purpose in constitutionally based discrimination cases.[149] The Court, at the same time, has recognized that:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.[150]

The "subjects of inquiry" on this question include: (1) the impact of the action; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; (4) any departures from usual procedures; and (5) any evidence of racially discriminatory intent.[151] Presumably other circumstantial evidence would include the absence of any legitimate interest served by the decision and the availability of less discriminatory alternatives.[152]

The decision in *Personnel Administrator v. Feeney*[153] is perhaps most significant in this line of cases in terms of the seniority question. The practice challenged was the statutory granting of an absolute veterans preference in the appointment of civil service positions, a preference that operates "overwhelmingly to the advantage of males."[154] Thus, in the better paying positions that men would apply for, women were effectively excluded; they were relegated instead to the lower paying positions that men were not interested in. Not only was the adverse impact on women "severe,"[155] it was also fully foresee-

148. *Id.* at 242. Concurring in the conclusion that discriminatory motive must be established, Justice Stevens emphasized the important circumstantial role that proof of adverse impact should still play:

> Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

*Id.* at 253 (Stevens, J., concurring).

149. *See* City of Memphis v. Greene, 451 U.S. 100 (1981) (challenge to Memphis' closing of a road connecting white area to predominantly black area, which had an adverse effect on the black neighborhood); City of Mobile v. Bolden, 446 U.S. 55 (1980) (challenge to an at-large election system, which had effect of diluting black voting strength); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (challenge to the absolute veterans preference for civil service positions, which had effect of limiting the consideration of females for civil service jobs); Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977) (challenge to a Chicago suburb's refusal to grant a request to rezone certain property to permit multiple-family occupation, which had effect of preventing minorities from living in the community). But see Rogers v. Lodge, 103 S. Ct. 3272 (1982), in which the Court sustained lower court findings based entirely on circumstantial evidence that the county at-large system of elections was maintained for a discriminatory purpose. This decision, while not overruling *Bolden*'s requirement of discriminatory intent, seems to establish that such intent can be proved by circumstantial evidence.

150. Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 266 (1977).

151. *Id.* at 265-69.

152. *See* Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Discrimination*, 15 SAN DIEGO L. REV. 1041, 1097 (1978).

153. 442 U.S. 256 (1976).

154. *Id.* at 259. For an excellent discussion of the lower court and Supreme Court decisions in *Feeney*, see Schnapper, *supra* note 56, at 31.

155. *Feeney*, 442 U.S. at 271.

able prior to adoption of the policy and crystal clear during its years of operation. Moreover, the preference had little if any relevance to job performance. Yet despite all of this, the Court in an opinion by Justice Stewart reversed the decision below, which had invalidated the preference, and ruled against plaintiff because she had failed to establish "purposeful discrimination."[156]

The Court relied on the district court's conclusion that the veterans preference "was not established for the purpose of discriminating against women."[157] But the Court rejected the lower court's application of "the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions."[158] Justice Stewart explained:

> [It] would . . . be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable. "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[159]

The dissenters, Marshall and Brennan, found the preference to be "purposeful gender-based discrimination," observing:

> [S]ince reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable. To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available. In the instant case, the impact of the Massachusetts statute on women is undisputed. . . . [The] absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. . . . [T]his consequence follows foreseeably, indeed inexorably, from the long history of policies severely limiting women's participation in the military. Although neutral in form, the statute is anything but neutral in application. . . . [Where] the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme.[160]

The implications of the *Feeney* definition of discriminatory intent for sen-

156. *Id.* at 256.

157. *Id.* at 274.

158. *Id.* at 278. This is a presumption the Court has adopted in other civil rights cases. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961) (constitutional claims "should be read against the background of tort liability that makes a man responsible for the natural consequences of his acts").

159. *Feeney*, 442 U.S. at 278-79 (footnotes and citations omitted).

160. *Id.* at 283-84 (Marshall, J., dissenting).

iority challenges is clear. In the typical case, the employer and union adopt or maintain a seniority system after years of excluding minorities from certain jobs. The foreseeable, indeed inevitable, effect is that minorities always will be disadvantaged in decisions regarding promotion, layoff, and recall because they were not allowed to accrue seniority along with their white coworkers during the period of discrimination. Maintenance of the system guarantees this result. Yet, under *Feeney*, it cannot be said that the employer and union "intended" this result without proof of actual discriminatory purpose, proof that is rarely available. This view of intent has prevailed in the Supreme Court's seniority cases.[161]

The notion of intent as "motive" and "purpose" represents a rejection of the traditional view of intent that prevails in the tort area, in which the term generally is defined without regard to the actor's motive or underlying purpose, but is used merely to distinguish conduct that is deliberate and volitional from conduct that is accidental.[162] Moreover, as the Court recognized in *Feeney*, tort intent encompasses not only those consequences that the actor actually desired, but also those which a reasonable person would believe are substantially certain to follow from the act.[163] Thus tort law has objectified

161. *See supra* notes 78-120 and accompanying text.

162. Thus Prosser explains:

> The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. The defendant may be liable although he has meant nothing more than a good-natured practical joke, or has honestly believed that he would not injure the plaintiff, or even where he was seeking the plaintiff's own good.
>
> To result in liability, the defendant's act must be a voluntary one. But a voluntary act, reduced to its lowest terms, is a contraction of the muscles, and nothing else. The movement of the finger which fires a gun is the same, whether it takes place in a crowded city, or in the solitude of the Mojave Desert. Its legal character must depend upon the actor's surroundings, and his state of mind with respect to them. His state of mind may involve many things: he may intend to move his finger, for the purpose of pulling the trigger, for the purpose of causing the bullet to strike a man, for the purpose of killing the man, for the purpose of revenge, of defending his country, or of protecting himself against attack. "Intent" is the word commonly used to describe the desire to bring about the physical consequences, up to and including the death; the more remote objective which inspires the act is called "motive." The one is merely a step less removed from the muscular contraction than the other. Each has its own importance in the law of torts, and a justifiable motive, such as that of self-defense, may avoid liability for the intent to kill.

W. PROSSER, THE LAW OF TORTS 31 (4th ed. 1971).

163. Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. An anarchist who throws a bomb into the royal carriage may actually wish to kill no one but the king; but since he knows that the death of others in the carriage is a necessary and almost inevitable incident to that end, and nevertheless goes ahead with the deed, it must be said that he intends to kill them. The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it. The driver who whips up his horses with a loud yell while passing a neighbor's team will not be credited when he denies that he intended to cause a runaway; and the defendant on a bicycle who rides down a man in full view on a side-

the requisite state of mind for its intentional wrongs, permitting it to be inferred from the circumstances of the act and thus avoiding the subjective question of actual state of mind.[164]

If, for example, *A* voluntarily points a loaded gun at *B* and pulls the trigger, striking him, *A* has "intentionally" shot *B* regardless of his underlying motive and regardless of whether he really did not intend to hit *B*. Motive would come into play only in certain limited circumstances, such as to establish the privilege of self-defense, or to determine whether punitive damages should be awarded. That *A*'s act was volitional and likely to cause injury is all that is necessary to make this an "intentional" tort.[165]

Illustrative of the common-law separation of motive and intent in establishing liability is *Truck Insurance Exchange v. Pickering*.[166] The issue here, whether defendant's automobile insurance policy excluded coverage of the incident, turned on whether defendant had "intended" to cause the fatal injuries incurred by a third person whom he had struck with his pickup truck. Defendant asserted that he did not mean to injure the victim but instead was merely trying to leave the scene of an earlier minor accident that had threatened to explode into a melee. It was determined at trial that defendant was aware of the presence of the victim near the path of his pickup when he sped off. The court rejected the invitation to investigate defendant's purpose at the time of the incident by noting that "[w]hen an intentional act results in injuries which are the natural and probable consequences of the act, the inju-

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walk where there is ample room to pass may find the court unwilling to accept his statement that he did not mean to do it.

*Id.* at 31-32. *See also* RESTATEMENT (SECOND) OF TORTS § 8A (1965):

> The word "intent" is used throughout the Restatement of this Subject [Torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it . . . . Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

J. DOOLEY, MODERN TORT LAW 198 (1982) ("Intent . . . includes consequences of conduct which the actor knows may result, regardless of his purpose. . . . Actual intent is impossible of proof by direct evidence except in rare situations. Triers of fact make that determination from surrounding circumstances."); Epstein, *supra* note 65, at 166.

164. This "intent as volition" standard is the one applied by the courts that have interpreted the "intent" clauses of Title VII other than the seniority proviso. *See supra* notes 31-36.

In a recent case involving the propriety of a punitive damage award in a § 1983 action, the Supreme Court similarly followed the tort lead in rejecting the contention that such an award can only be made upon a showing of evil motive or actual intent to inflict harm. *See* Smith v. Wade, 103 S. Ct. 1625 (1983). The Court emphasized the "quite distinct concepts of *intent to cause* injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other," *id.* at 1630 n.6, observing that "[c]onsciousness of consequences or of wrongdoing, of course, does not require injurious intent or motive; it is equally consistent with indifference toward or disregard for consequences." *Id.* Thus, "indifference to consequences" rather than "intent to cause consequences" is sufficient to support an award of punative damages. *Id*, at 1633 n.10.

165. *See, e.g.*, Makovicka v. Lukes, 182 Neb. 168, 153 N.W.2d 733 (1967). In *Makovicka* defendant and plaintiff were good friends. While horseplaying, the former picked up the latter in his arms, carried her outside the house, lost his balance, and the fall injured her. Despite defendant's testimony that he had no intent to injure his friend, and no malicious purpose, the court held that a tort action was properly brought.

166. 642 S.W.2d 113 (Mo. Ct. App. 1982).

ries as well as the act are intentional."[167] The court explained:

> Probing one's state of mind is an elusive task at best. Supplanting an objective standard with a subjective standard for determining whether the act or conduct . . . is "intentional" . . . would emasculate apposite [insurance] policy provisions by making it impossible to preclude coverage for intentional acts or conduct absent admissions by insureds of a specific intent to harm or injure. Human nature augers against any viable expectation of such admissions.[168]

The tort literature is not entirely lacking in suggestions that a motive element does or should play a role in establishing liability.[169] Prosser seems to support consideration of motive in certain torts, like nuisance and interference with economic relations, in which the reasonableness of defendant's interference with the plaintiff's rights may depend on the former's reasons for acting.[170] Motive may also play a part in claims for intentional infliction of emotional distress, as well as in the qualified privilege defense in actions for alienation of affections, malicious prosecution, and defamation.[171] In the former case, for example, the courts usually have required a showing that the defendant specifically intended to cause emotional distress, or at least acted in conscious disregard of a high probability of such harm.[172]

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167. *Id.* at 116.

168. *Id. See also* Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1982), in which suit was brought to recover damages for contamination of oil reserves by the defendant's injection of hazardous chemicals into plaintiff's pipeline. Defendant argued that it lacked the requisite "intent" required for liability because the reason for injecting the chemicals was to save time and money, and not to harm plaintiff's supplies. The court, concluding that defendant's use of the chemicals created a likely risk of damage to plaintiff's oil, rejected the assertion that defendant's good motive was relevant. It held that it was not "necessary . . . to find that [defendant] harbored a hostile intent, or desired to do any harm in order to hold that [defendant] committed an intentional tort." *Id.* at 1309. Similarly, although "intent to deceive" is deemed an element of an action for fraud, intent is usually defined simply as conduct which is not inadvertent, regardless of motive or purpose. *See* Cohan, *The Rights and Duties of Retail Merchants Under State Consumer Protection Laws: Emergent Doctrines and Strategies of the Defense*, 18 NEW ENG. L. REV. 297, 312 (1983).

169. *See, e.g.*, Ames, *How Far an Act May Be a Tort, Because of the Wrongful Motive of an Actor*, 18 HARV. L. REV. 411 (1975); Lawrence, *Motive as an Element in Tort*, 12 ME. L. REV. 47 (1919). Professor Lawrence argued that the human act can never be understood apart from its purpose, and he proposed that "[t]he door should be thrown wide open for evidence revealing the true nature, character, object and purpose of all human acts resulting in injury to others." *Id.* at 55-56. Lawrence cautioned, however, of the impracticality of an inquiry into motive and thus concluded that "while . . . evidence indicative of mental conditions may be received, it should not be forgotten that the *factum probandum* is the character of human action, and not a photograph of the human brain, mind, or heart." *Id.* The primary thrust of much of what the motive proponents suggest is that otherwise lawful conduct done with a malicious motive should be actionable, which is of course the flip side of the coin from the seniority question—can conduct with harmful results be redeemed by good motive?

170. W. PROSSER, *supra* note 162, at 23-26.

171. W. PROSSER, *supra* note 162, at 23-26. *See also* Seavey, *Bad Motive Plus Harm Equals a Tort*, 26 ST. JOHNS L. REV. 279 (1952).

172. RESTATEMENT (SECOND) OF TORTS § 47 (1965).

Even in actions in which "malice" has to be established, however, the term has been given "a broad spectrum of meanings." *See* Smith v. Wade, 103 S. Ct. 1625, 1631 n.8 (1983). While at times it has been interpreted to require a showing of ill will, spite, or intent to injure, it has often been used to mean that the "tort resulted from a voluntary act, even if no harm was intended." *Id.* In still other cases it has been defined as "an intent to do the act that caused the injury, as opposed to the intent to cause the injury itself." *Id.*

It would appear, however, that motive is likely to be weighed in the liability determination only when the courts are wary of a particular type of claim, such as the emotional distress cause of action. As Prosser has observed, when through the passage of time and "with the approval of custom and public opinion, the rights and privileges of the parties in particular situations have become crystallized, standardized, definite, or 'absolute,' " then "the law looks at them with a purely objective view" and motive inquiries generally become irrelevant.[173] The majority of courts, in other words, have refused to travel into the immensely intricate domain of human motivation to determine intentional tort liability.

Nor does motive play a significant role in the other major area of fault liability, negligence. Just as the law of intentional torts establishes an objective state of mind standard by presuming that the actor intends the normal consequences of his conduct, the law of negligence judges conduct by the standard of reasonableness.[174] Liability for negligence is founded on defendant's actual *or constructive* (what he *should have* known) knowledge that there is a probable risk of injury to the others. What characterizes an act of negligence is that there is a risk of harmful consequences that is of a sufficient magnitude that "the reasonable person" would anticipate them and take action to avoid them.

As with intentional torts, the state of defendant's knowledge is to be distinguished from his motive and purpose. If *A*'s conduct creates an unreasonable risk of harm to others, he is liable for negligence even though his underlying state of mind was one of great concern for the safety of others.[175] Put another way, it is no defense to a negligence action that defendant's motive was to act in a careful way. Conversely, if defendant's conduct did *not* create an unreasonable risk of harm, then defendant was not negligent even though his state of mind might have been one of utmost carelessness. Thus the doctrine of negligence generally permits recovery for unintended but foreseeable harm, without regard to defendant's motive underlying the conduct. Defendant's conduct is blameworthy only in the sense of creating an unreasonable risk of such harm.[176]

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173. W. PROSSER, *supra* note 162, at 24-25.

174. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965).

175. Similarly, with regard to the tort standard of conduct defined as "willful and wanton," it is not the underlying purpose of the actor that is in question but instead the knowledge, either actual or constructive, that the actor had of the degree of risk involved in his conduct. *See id.* §§ 500-503; Smith v. Wade, 103 S. Ct. 1625, 1632 n.8 (1983) ("Wanton" conduct includes action taken with actual or constructive knowledge of the likely harm; "willfulness" means only voluntary action, not intent to cause injury.). For a comparison of the degree of "willfulness" required in parallel statutes creating criminal and civil liability (*e.g.*, FLSA, Truth-in-Lending, Fair Labelling), see Cooper & Sobol, *supra* note 17, at 1676 & nn.24-26.

176. As Prosser wrote: "It is now more or less generally recognized that the 'fault' upon which liability may rest is social fault, which may but does not necessarily coincide with personal immorality." W. PROSSER, *supra* note 162, at 18.

Indeed, the economic theorists would have us believe that our system uses "fault" as a shorthand term for market deterrence, along the lines originally suggested by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d. Cir. 1947), by weighing the cost of preventing the accident against the probability of its occuring and the magnitude of the loss if it

Under the objective view of conduct generally prevailing in tort doctrine, the adoption and maintenance of a seniority system in the face of the foreseeable risk that it will harm minority employees because of past discrimination at that shop would constitute at least negligent, and perhaps intentional, conduct. Certainly after the system has been operating and producing disparate results, the conduct would be considered "intentional,"[177] and at least one court has so held.[178] The *Swint* definition of intent thus represents a concept

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occurs. Thus if the cost of safety measures exceeds the economic benefit in accident prevention, the tort system does not hold the actor liable. If, however, the benefit of accident prevention exceeds the costs, the negligence doctrine is applied to make the actor liable "in the expectation that self-interest will lead it to adopt the precautions in order to avoid a greater cost in tort judgments." Posner, *A Theory of Negligence*, *supra* note 65, at 33. *See also* Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEG. STUD. 13, 28 (1972) ("The use of words such as 'blame,' 'responsible,' and 'fault' must be treated with care by the economist because they have no useful meanings in an economic analysis of these problems other than as synonyms for the party who could have most easily avoided the costly interaction."). For an economic analysis of liability for intentional torts, see Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. LAW & ECON. 201 (1971). For a critique of the economic theorists from a socialist perspective, see Abel, *Torts*, in D. KAIRYS, THE POLITICS OF LAW 185 (1983) [hereinafter cited as POLITICS].

177. Suggestions regarding this analysis of liability appear in the earliest scholarly work on Title VII. *See* Cooper & Sobol, *supra* note 17, at 1653:

> As soon as an employer is, or should reasonably be, on notice that a test is not predictive of job performance and is disproportionately screening out blacks, the discrimination that results can realistically be interpreted as "intended." Intent, under this interpretation, is not frozen at the time a test is adopted, but rather continues to evolve as the context of test use changes. Moreover, any test causing this result is being "used" to discriminate, whether or not so intended.

*See also* Rachlin, *supra* note 17, at 482:

> (a) "result of an intention" [as used in § 703 (h)] means that a currently bad result violates the statute regardless of the fact that the intention existed before the act, or (b) one has a current intent to do wrong if one is aware that the result of one's previous acts is a present discriminatory effect.

Recently Eric Schnapper, criticizing *Teamsters*, concluded that a system which perpetuates past discrimination, known to those who adopt and maintain the system, should be violative of Title VII. *See* Schnapper, *supra* note 56, at 57-58.

Writers have made the same observation with regard to legislative motivation and the *Washington v. Davis* standard. *See* Simon, *supra* note 152, at 1126-27 (If a law is enacted for a proper purpose but turns out to have disparate effect, failure to repeal the law is suspect, since the legislature now knows what it is doing. Similarly, the failure of the defendants to change their testing procedure in *Washington v. Davis*, once the substantial discriminatory impact was known, should entitle the plaintiffs to prospective relief.). Several civil rights cases have turned on the defendant's knowledge of the impact of its actions. *See* Reed v. Rhodes, 607 F.2d 714, 722 (7th Cir. 1979) (school board's knowledge through available statistical data that decisions had racially segregative effect); De la Cruz v. Tormey, 582 F.2d 45, 58 (9th Cir. 1978) (defendants' knowledge that by failing to revise their policies they were contributing to discriminatory employment results); Arthur v. Nyquist, 573 F.2d 134, 144 (2d Cir. 1978) (school board's knowledge of segregative impact of its policies); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir. 1977) (school board's decision to rescind integration plan made with full knowledge that rescision would return black children to resegregated schools).

In other statutory contexts, knowledge that a discriminatory situation is likely to occur, or is occurring, can give rise to additional damages being assessed against the employer. *See* B. SCHLEI & P. GROSSMAN, *supra* note 35, at 440 (Equal Pay Act).

178. *See* United States v. Georgia Power Co., 634 F.2d 929, 937 (5th Cir.) ("A failure to show conscious intent to discriminate does not preclude a finding of discriminatory purpose. . . . Both the union and the company were found to have been aware of the discriminatory impact of the seniority system. In view of this awareness, . . . the seniority system here was the result of purposeful discrimination."), *rev'd and remanded*, 456 U.S. 952 (for reconsideration in light of Pullman-Standard v. Swint, 456 U.S. 273 (1982)), *decision on remand*, 695 F.2d 890 (5th Cir. 1983). This case is discussed *infra* notes 206-11.

unlike that prevailing in tort doctrine.

It appears that the motive-centered intent requirement applied by the court in seniority challenges is more akin to a concept found in the criminal law.[179] Crimes generally require a certain state of mind, or *mens rea*, before they can be established.[180] Under traditional terminology, most crimes require only a showing of "general intent," analogous to the tort notion of deliberate conduct with knowledge or constructive knowledge of the likely consequences. Other crimes, however, require "specific intent," which is an additional intention to cause a specific consequence. Examples of the latter would include assault with intent to kill and treason, which requires an intent to aid the enemy. The Model Penal Code has adopted another approach and defines instead four different mental states applicable to elements of crimes: "purposely" (the actor consciously desires his conduct to cause a particular result); "knowingly" (the actor is aware that his conduct is practically certain to cause a particular result); "recklessly" (the actor is aware of a risk that his conduct might cause a particular result); and "negligently" (the actor should be aware of a risk that his conduct might cause a particular result).[181] The *Swint* standard most closely resembles the requirements that the defendant act with specific intent or purposely.[182] These represent the highest levels of state of mind proof required on the criminal side.[183] Crimes requiring that the defendant act "knowingly," "recklessly," or "negligently" do not necessitate a finding of conscious intent to cause the particular result, but merely a degree of awareness that such result is likely.[184] These mental states apparently

179. When arguing in support of a similar purposeful intent standard for the renewal of the Voting Rights Act, Senator Orrin Hatch analogized it to the criminal law standard. *See* The MacNeil-Lehrer Report, Transcript # 1658, at 4 (Feb. 3, 1982) ("[W]ith regard to the intent test, we prove intent everyday. In every criminal case in this country beyond a reasonable doubt."). This analogy ignores the material difference between a criminal prosecution and civil litigation, differences in the underlying purposes of the laws in question as well as in the nature of the proceedings. Perhaps most obviously, the burden of proof on the prosecution is considerably higher than that on the plaintiff, and that "reflects society's desire not to deprive a defendant of his liberty or subject him to community opprobrium without extremely reliable proof of guilt; it also reflects a desire to protect the individual against the litigational advantages the state enjoys in prosecuting him." *See* Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 117 (1983).

180. *See generally* W. LA FAVE & A. SCOTT, HANKBOOK ON CRIMINAL LAW 195-208 (1972); R. PERKINS, PERKINS ON CRIMINAL LAW 739-764 (2d ed. 1969); Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917); Duff, *Intention, Mens Rea and the Law Commission Report*, 1980 CRIM. L. REV. (1980); Perkins, *supra* note 65; Note, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105 (1931). In a recent essay, however, Professor Perkins identifies (and sharply criticizes) "an increasing reliance on notions of strict liability and its concomitant punishment without fault." *See* Perkins, *A Rationale Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1068 (1983).

181. MODEL PENAL CODE § 2.02 (Tent. Draft 1955).

182. A recent student note makes a similar comparison between the intent standard of *Washington v. Davis* and the concept of mens rea in criminal law. *See* Note, *supra* note 179, at 111.

183. In other words, the Court has read Title VII as if it were a *criminal* statute providing: It shall be a violation of the law for an employer or labor organization to adopt and maintain a seniority system that perpetuates the effects of the employer's past discrimination, but only if the defendant acted purposely and with the specific intent to cause such a discriminatory result.

184. The Supreme Court has noted that historically "even crimes of intent commonly required only intent to do the criminal act (and, in some cases, knowledge that the injury would likely follow), rather than actual ill will or purpose to inflict an injury." Smith v. Wade, 103 S. Ct. 1625,

would not satisfy the *Swint* intent requirement.

The significance of this capsule view of the tort and criminal law is to suggest that, as a comparative matter, the intent requirement set down by the court for seniority challenges is by no means commonly found in the law. The

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1632 n.9 (1983) (citations omitted). "Motive," as distinguished from "intent," is a term "which has caused the [criminal law] theorists considerable difficulty for years." W. LAFAVE & A. SCOTT, *supra* note 180, at 204. Perkins has written:

> The difference between intent and motive may be emphasized by illustration. If one man has caused the death of another by a pistol shot, his *intent* may have been any one of an almost infinite number, such as to kill the deceased, to frighten the deceased by shooting near him without hitting him, or to intimidate the deceased by pointing the weapon at him without shooting. If in the particular case the intent was to kill the deceased, the motive of the shooter may also have been one or more of a number of possible motives, such as, hatred, revenge, jealousy, avarice, fear, or even love.

Perkins, *supra* note 65, at 921.

While it is often said that motive is irrelevant to the establishment of an offense, this in fact seems somewhat misleading. First, "specific intent" crimes involve proof of the reasons behind the act in the sense that the actor must be shown to have intended the specific result. Second, crimes like burglary have an element that goes to the defendant's purpose, such as breaking and entering for the purpose of committing a felony. *See* W. LAFAVE & A. SCOTT, *supra* note 180, at 204.

It is true, however, that if motive is defined as the *underlying* reason for the actor's conduct, then it is irrelevant to the question of criminal liability. Thus, if one burglar entered the dwelling in order to get money to support a drug habit, and another in order to feed his children, that underlying motivation makes no difference on the question of whether a crime had been committed. His motive would come into the case only as part of a circumstantial evidentiary showing against the defendant in the absence of direct proof, and, of course, on the question of appropriate sentence. *See e.g.*, United States v. Berrigan, 417 F.2d 1002 (4th Cir. 1969), in which Father Phillip Berrigan and others were convicted of destruction of government property and interference with the selective service system, to wit, pouring animal blood over government records. The defendants argued that their action was motivated by a sincere belief that United States involvement in the Vietnam War was immoral, and thus their conduct was not "willful" as required by the statute. The court rejected this view, stating that "the defendants' motives, whatever motive may have led them to do the act is not relevant to the question of the violation of the statute, but is rather an element proper for the judge's consideration in sentencing." *Id.* at 1004. *See also* United States v. Howard, 504 F.2d 1281 (8th Cir. 1974), in which defendant was convicted under a federal statute which prohibited "willfully and knowingly" becoming involved in the transferring of counterfeit currency. The defendant argued that he was acting in a private undercover effort to apprehend the real culprits and thus lacked the requisite level of intent. The court rejected this, holding that "[n]oble motives and pure thoughts cannot bar the conviction of one who admits intentional action which violates the proscriptions of a statute declaring that action criminal." *Id.* at 1284.

Even for crimes in which "malice" is an element of the offense, it appears that proof of motive is *not* necessary. Perkins, for example, discusses the crime of malicious mischief. He notes:

> Where the issue has been squarely presented the courts have tended to reject the notion that any element of ill-will, grudge or spite is required for conviction of malicious mischief. The malice in such cases is sometimes spoken of as "inferred or presumed." What is really meant is that the mental element required for conviction and known to the law as 'malice' requires no more than the intentional doing of the particular harm without circumstances of justification, excuse or substantial mitigation. It is rather generally recognized that this is sufficient for malice in the commission of other crimes, such as blackmail, false imprisonment, libel, malicious prosecution, mayhem or murder.

Perkins, *supra* note 65, at 916. This definition of malice appears similar to the *Griggs* standard: causing disparate impact without the justification of job-relation or business necessity. *See supra* notes 51-65 and accompanying text.

As in the tort experience, courts have been resistant to the use of motive in determining criminal liability in large part because of the difficulty in uncovering the reasons behind human action. Chief Justice Brian put it well: "[T]he thought of man shall not be tried for the devil himself knoweth not the thought of man." Y.B. 7 Ed. IV. t.2, pl.2., *quoted in* Note, *supra* note 180.

major focus in criminal and tort law remains on the socially harmful result, not the reasons why the defendant decided to cause or risk that result.

### *B. The Lower Courts' Application of the Intent Standard*

To appreciate the real significance of a specific intent requirement in seniority challenges, it is necessary to survey its application in the lower courts. Some of the criteria that should inform our evaluation of the standard's operation are: (1) whether the standard provides a workable rule that courts can employ to make reasoned distinctions between fact patterns; (2) whether the standard guides the court and the parties preparing and conducting the litigation; and (3) whether the standard serves to further the policies of Title VII.

It is axiomatic that the *Swint* standard, focusing on purpose rather than effect, introduces considerable complexity and uncertainty into the resolution of seniority challenges. *Swint* illustrates this fact in the disagreement between district and circuit courts over whether the same body of facts reflects discriminatory purpose. A similar disagreement occurred in *Terrell v. United States Pipe & Foundry Co.*,[185] in which the failure to provide carry-over seniority from previously segregated units had the effect of maintaining de facto segregation for a decade after the enactment of Title VII.[186] By 1983 the search for the real purpose and intent underlying the seniority system had consumed eleven years of litigation, only to result in a remand to the trial court for yet another determination of defendant's motives.[187] Although designed to bring some uniformity into the area, the *James* factors[188] for assessing the lawfulness of seniority systems under section 703(h) have proven highly malleable and seem merely to rephrase the question rather than provide definitive guidance.[189]

In contrast to these cumbersome lawsuits searching for the state of mind of the creators and maintainers of the seniority system, are those seniority challenges in which section 703(h) was held inapplicable and thus motive inquiry was unnecessary. In *Jackson v. Seaboard Coast Line Railway*,[190] for example, the court held that the defendant union had waived its section 703(h) defense by not raising it in a timely manner. The case was thus treated under the *Griggs* analysis: was there a showing of substantial adverse racial impact and, if so, could it be justified by business necessity? The black plaintiffs had

185. 644 F.2d 1112 (5th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2028, *on remand*, 696 F.2d 1132 (5th Cir. 1983).

186. An example of the effect of this system was noted by the Fifth Circuit Court of Appeals in the case of a black employee with 26 years on the job who took advantage of his newly-won right to transfer to a better department. His transfer resulted in a loss of all seniority, and he was soon laid off as part of a plant reduction. Two white workers with just a few years on the job, but in the better department, kept their jobs. *Id.* at 1115.

187. *Id.* at 1135.

188. *See supra* text accompanying notes 113-15.

189. *See generally* Kasold, *Toward Definition of the Bona Fide Seniority System*, 35 U. FLA. L. REV. 41 (1983). Kasold has demonstrated the significant inconsistencies in interpretation and application of each factor among the circuit courts. *See also infra* note 211.

190. 678 F.2d 992 (11th Cir. 1982).

been hired as far back as the 1940s but were still in entry level positions as a result of a combination of initial assignment and a seniority system (revised in 1968) which kept them in their original positions. With no need to make a determination of the defendants' purpose and design the court was able instead to explore the actual results of the practices and to weigh them against the business interests they served.

Similarly, in *People v. N.Y.C. Transit Authority*[191] the New York Court of Appeals interpreted the state civil rights law, which does not contain an exception like section 703(h), in the context of a seniority challenge. Until 1971 the Transit Authority had prohibited females from taking the entry examination for hire as bus drivers, and no female drivers were appointed until 1978. In 1981 the Authority announced that promotions would be made to dispatcher (the first level of management) and that selection would be based on the candidates' seniority in the driver position. Because of the prior exclusion, no woman had more than three years seniority. Thus, all promotions would go to men. The State Attorney General brought an action under the Human Rights Act and the equal protection clauses of the state and federal constitutions alleging that the neutral seniority system perpetuated the past discrimination in hiring. In the absence of a discriminatory purpose requirement, the court of appeals applied a *Griggs* analysis to the state civil rights law claim,[192] found disparate impact, and remanded for a determination of the business necessity question. Thus, the obvious impact of the seniority system in conjunction with past practices was analyzed in terms of the results, not through speculation about the purpose behind the results. Since the constitutional claims required a showing of purpose and intent, however, the Court affirmed dismissal of these claims for lack of the requisite allegations.

A survey of those few recent cases in which plaintiffs have sucessfully challenged seniority systems under the section 703(h) intent standard reveal that those plaintiffs generally have been able to establish demonstrable deviations from routine operation of the system. In *Payne v. Travenol Laboratories Inc.*,[193] for example, the employer's consideration of length of service as a criterion for promotion was found to perpetuate past hiring discrimination. Rejecting defendant's argument that this seniority factor was protected by section 703(h), the Fifth Circuit wrote: "We see no application of *Teamsters* to the instant case. Travenol's informal and erratic reliance on length of service falls short of being a bona fide seniority system under the statute and under *Teamsters*."[194]

Deviation from the normal operation of the system also impressed the Fifth Circuit in *Scarlett v. Seaboard Coastline Railroad*,[195] in which the court

191. 59 N.Y.2d 343, 452 N.E.2d 316, 465 N.Y.S.2d 502 (1983).

192. The Court reserved for later decision the question whether some provision like § 703(h) should be read into the New York law. *Id.* at 350-51, 452 N.E.2d at 319-20, 465 N.Y.S.2d at 505-06.

193. 673 F.2d 798 (5th Cir. 1982).

194. *Id.* at 827.

195. 676 F.2d 1043 (5th Cir. 1982).

found "consistent disregard" of the neutral seniority provisions when they would benefit the five black plaintiffs, permitting whites with less seniority to be promoted over them,[196] and in *Terrell v. United States Pipe and Foundary Co.*,[197] in which a "racial swap" of positions between bargaining units permitted the seniority system to operate in a disparate manner. In *Wattleton v. International Brotherhood of Boiler Makers*,[198] the Seventh Circuit's ruling in favor of plaintiffs was based in large part on the finding that at various times white employees had been permitted to transfer between units without loss of seniority, but no black employee had ever been able to do so.[199]

In dismissing seniority challenges, the courts often have relied on plaintiffs' failure to produce evidence of significant deviations from the established system. In *Wright v. Olin Corp.*[200] the evidence established that females had been steered into the least desirable jobs and that the highest paying departments were predominantly male. The company responded that this resulted from the operation of its seniority system, which controlled assignments, promotion, and transfers. Noting that the "plaintiffs produced virtually no evidence that Olin substantially deviated from the seniority method of assigning jobs,"[201] the court ruled the system bona fide and protected by section 703(h). Similarly, in *Taylor v. Mueller Co.*[202] the departmental seniority system was found to be perpetuating past discrimination by locking blacks into the lowest paying jobs, but the court of appeals affirmed the district court's judgment for the defendants, noting that there were no deviations from the strict use of seniority to determine an employee's position. Moreover, "[t]he fact that the seniority system was adopted at a time when Mueller practiced racial discrimination in its employment practices does not establish that the system had its genesis in racial discrimination." There was also insufficient evidence to establish "that an intent to discriminate entered into the 'very adoption' of the Mueller seniority system."[203]

Many courts have thus seized upon the presence or absence of manipulation in the seniority system as a key element in the section 703(h) analysis. The courts, at times, seem to be reading the requirements that the system be "bona fide" and that the results of its operation not reflect an "intention to

196. *Id.* at 1051-52.

197. 644 F.2d 122 (5th Cir. 1981).

198. 686 F.2d 586 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1199 (1983).

199. *Id.* at 588. The court also pointed to significant changes that were made in the seniority system coincident with the hiring of blacks for the first time in 1948. *See also* Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365, 1374 (10th Cir. 1981) (system was maintained with a discriminatory purpose because union had sought transfer of duties from black to white employees).

200. 697 F.2d 1172 (4th Cir. 1982).

201. *Id.* at 1180. The removal of a black female from a bidding list and her replacement by a male with less seniority who was subsequently given the job was not considered significant. *See id.* at 1180 n.10.

202. 660 F.2d 1116 (6th Cir. 1981).

203. *Id.* at 1123. *See also* Brooks v. ACF Indus., 537 F. Supp. 1122, 1134 (D.W. Va. 1982) (seniority system that prevented women from working in janitorial department was permissible because it had been adhered to consistently and had evolved "without either the [employer's] or the Union's having had at any time whatever any inkling, intent or purpose that [the seniority system] . . . would operate discriminatorily, much less unlawfully so").

discriminate" as a single concept—as long as the system is left to run without interference, it is neutral and therefore not the product of discriminatory motive. In view of the difficulty of determining the "purpose" behind the system,[204] it is not surprising that irregularities have come to the fore when assessing both the bona fides of the seniority arrangements and the circumstantial evidence of unlawful motives.

Yet this emphasis is troublesome. Does the fact that the discriminatory impact is arrived at through strict adherence to the established seniority system always indicate that the employer and union lack discriminatory purpose, or might it merely mean that the system is functioning so well in achieving that purpose that no deviation is required? Conversely, does deviation from the system in a way that happens to add to discriminatory impact always mask invidious motive, or might it merely involve racially innocent patronage to union favorites? In short, the criterion of regular operation may very well be both under- and over-inclusive, netting the clumsy discriminator and at times the racially neutral "old-boy" network, while letting pass the sophisticated discriminator who sees to it that all "i's" are properly dotted. As such, although this factor gives the litigants and the court something tangible on which to focus, it is questionable whether it permits reasoned distinctions between fact patterns, or serves the nondiscrimination goals of Title VII.

Plaintiffs faced with seniority systems that preserve a discriminatory status quo but do so without departure from the rules are forced to seek "smoking gun" evidence of discriminatory purpose, a quest that in the large majority of cases will be futile.[205] One of the rare cases in which plaintiffs successfully have challenged the system in the absence of such proof is *United States v. Georgia Power Co.*[206]

In *Georgia Power* blacks had been steered into the lowest job classifications prior to 1963, and transfer was virtually impossible. After 1963 the no-transfer practice was replaced by a unit seniority system. Although the white units had lines of progression through which whites could advance without loss of seniority, the black units had only one job; thus blacks could advance only by transferring, and this meant complete loss of accumulated seniority.[207]

The district court held that the seniority system conformed to the requirements of section 703(h)—it was bona fide and not negotiated or maintained

204. See Waker v. Republic Steel Corp., 675 F.2d 91, 92 (5th Cir. 1982), in which the court candidly concedes this difficulty.

205. *See, e.g.*, Freeman v. Motor Convoy, 700 F.2d 1339 (11th Cir. 1983) (after prevailing on their seniority challenge in the district court prior to the *Teamsters* decision, plaintiffs lost on remand because they had no proof of discriminatory purpose); Moore v. IATSE Local 659, 29 Fair Empl. Prac. Cas. 542 (D. Cal. 1982) (hiring roster listing candidates based on time spent working in the film industry, although freezing the status quo of exclusion of females from industry jobs, was permissible in absence of evidence that it was established or maintained for discriminatory purpose); Afro-Am. Police League v. Fraternal Order of Police, 553 F. Supp. 664 (N.D. Ill. 1982) (complaint dismissed for failure to allege specific facts establishing intentional discrimination behind seniority system).

206. 634 F.2d 929 (5th Cir. 1981), *vacated and remanded*, 456 U.S. 952 (1982), *decision on remand*, 695 F.2d 890 (5th Cir. 1983).

207. *Id.* at 931.

with a discriminatory purpose.[208] The Fifth Circuit reversed and held the system violated Title VII; the facial equality between whites and blacks was "but a mask for the gross inequality beneath."[209] The conspicuous lack of any lines of progression within the black units exposed the real purpose of the seniority system—it intentionally reinforced the purposefully-segregated job classification scheme. The Fifth Circuit reached this conclusion in the face of the explicit finding below that there was "no showing of any conscious intent" to discriminate with regard to the scheme of job seniority.[210] The court ruled that such "conscious intent" could be inferred from the facially disparate impact and the lack of any non-racial explanation for it. The Court added:

> Both the union and the company were found to have been aware of the discriminatory impact of the seniority system. In view of this awareness, the . . . findings of the district court clearly show the seniority system here was the result of purposeful discrimination.[211]

The *Swint* specific intent requirement has thus clearly switched the spotlight in seniority litigation away from the effects of the system in the workplace, and toward a search for clues of the purpose and design behind the system. Even in such cases as *Georgia Power*, impact is deemed significant only insofar as it is evidence of purpose. What remains to be explored is an evaluation of this development from a policy perspective.

### *C. Reflections on the Specific Intent Standard in Seniority Challenges*

The seniority system in the typical section 703(h) case is an integral part of the glue that maintains a segregated workplace. Without a unit seniority rule, past discrimination in hiring and assignments gradually would be undone as the incumbent victims accrue company seniority that permits them to advance, and the previously rejected applicants are hired and permitted to compete for positions for which they are qualified. Seniority, regardless of the intention, inhibits this process and keeps minorities "in their place." Given the broad assault on discrimination in the workplace that Title VII represents, the

208. United States v. Georgia Power Co., 470 F. Supp. 649, 652 (N.D. Ga. 1979), *rev'd*, 634 F.2d 929 (5th Cir. 1981), *vacated and remanded*, 456 U.S. 952 (1982), *decision on remand*, 695 F.2d 890 (5th Cir. 1983).

209. *Georgia Power*, 634 F.2d at 935.

210. *Id.* at 937.

211. *Id. Georgia Power*, it must be emphasized, involved the *complete* segregation of blacks into the lowest job classifications. Thus, the seniority system, by preventing transfer, worked to the *sole* disadvantage of blacks. *Compare International Bhd. of Teamsters v. United States*, discussed *supra* notes 78-91, in which the Supreme Court faced a departmental seniority scheme that discouraged transfer from a unit occupied by *both* whites and minorities. The Court, although recognizing that all minority applicants were discriminatorily steered into the lower unit, nevertheless found the seniority system neutral and bona fide because "drivers . . . who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white." *Teamsters*, 431 U.S. at 356.

*See also* Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365 (10th Cir. 1981) (system found in violation of Title VII where the unit from which employees were discouraged from transferring was all black). *Contra* Taylor v. Mueller, Co., 660 F.2d 1116, 1122 (6th Cir. 1981) ("[T]he fact that the black employees were locked into lower job classifications than their white fellow employees is not sufficient to deprive the system of its section 703(h) immunity.").

section 703(h) intent standard has proven a formidible, often insurmountable, obstacle to equal opportunity.

Does the *Swint* standard serve the legislative purpose behind section 703(h)? Given that Congress intended the seniority exception to preserve in some way the expectations of "innocent" nonminority employees,[212] it is not immediately apparent why expectations developed under a system whose disparate impact on minorities cannot be shown to be "purposeful" are any more deserving of preservation than those developed under a system in which a court discerns such purpose. Both systems perpetuate a past regime of segregation. Presumably the "innocence" of the white employees is constant in both systems.[213] Yet "punishment," in the form of decreased seniority rights, is meted out to white employees in one system but not the other because of an after-the-fact determination that their union or employer designed the seniority apparatus to disadvantage blacks, rather than merely maintained a system which had that forseeable, often inevitable, effect. The Supreme Court seemed to anticipate this anomaly when it wrote in *Franks* that "the impact of rightful place seniority upon the expectations of other employees . . . is in no way a function of the specific type of illegal discriminatory practice upon which the judgment of liability is predicated."[214]

The American legal system has historically shown a particularly strong commitment to the notion of "no liability without fault."[215] Slowly, however, the recognition developed that those engaged in certain abnormally dangerous activities should be held strictly liable for the consequences of those activities without regard to the question of blame.[216] Similarly, the conclusion spread that injuries arising out of workplace mishaps, the use of manufactured products, and other common accidents should be compensated through some system other than tort litigation based on fault, which was failing both to

212. *See supra* notes 18-41 and accompanying text.

213. Gunnar Myrdal observed many years ago that: "[T]o give white workers a monopoly on all promotions is, of course, to give them a vested interest in job segregation." G. MYRDAL, AN AMERICAN DILEMMA 391-92 (1944), *quoted in* United Packinghouse Workers v. NLRB, 416 F.2d 1126, 1136 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 903 (1969). Such vested interest is unaffected by the methods or motives that lie behind the monopoly.

214. *Franks*, 424 U.S. at 764 n.21.

215. Nineteenth Century American tort law came to be dominated by fault notions. In the leading case of Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), plaintiff brought a trespass action for assault and battery against defendant, who had raised a stick to separate two fighting dogs and in the process accidentally struck plaintiff, who was standing behind him. Under traditional English law of trespass, plaintiff should have won without regard to defendant's blameworthiness. The Massachesetts court, however, found for defendant, holding that liability in trespass required either intentional or negligent wrongdoing. The decision was widely followed. American courts in the 19th century generally rejected the English doctrine of strict liability for harm caused by abnormally dangerous activities, represented by Rylands v. Fletcher, 3 H.L. 330 (L.R. 1868). Indeed, the fault ethic was so powerful that the New York Court of Appeals in 1911 declared that state's first workers' compensation statute unconstitutional because it imposed liability without fault. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911). *See supra* note 65.

216. The activities included in this category are those that are too socially necessary to prohibit altogether, but nevertheless create unusual risks of harm. These include blasting, storing dangerous substances, and keeping dangerous animals. *See* W. PROSSER, *supra* note 162, § 78; RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965).

compensate victims and to encourage safety measures.[217]

The dissatisfaction with fault liability arose in part from the cost in time, money, and resources that were being diverted into the adversary process on fact issues which were at best difficult to prove.[218] As noted above, the *Griggs* theory of disparate impact discrimination seems premised on many of these same concerns with regard to the enforcement of Title VII.[219] Now, however, in the critical area of perpetuation of past discrimination by seniority schemes, we have a return to fault consciousness.

Many rationales have been advanced to justify basing tort liability on fault.[220] One is a moral basis—a defendant should pay for damages only if they resulted from "blameworthy" conduct on his part. A second, suggested by the economic theorists[221] and traceable back to Learned Hand's famous formula,[222] is that liability should be imposed on the injurer only when it would have been cheaper for him to avoid the accident by appropriate precautions than to pay the accident's costs. The purpose served by this notion of fault is to incorporate a cost-benefit analysis into a deterrence theory. Morton Horwitz has written of yet another argument advanced in favor of fault—that such liability-limiting doctrines are needed to prevent the law from being used for the purpose of redistributing wealth and driving entrepreneurs out of business.[223]

None of these justifications seems very persuasive support for the *Swint* intent requirement. Regarding the moral question, a seniority challenge presents us with an employer or union that has engaged in past discrimination which is continuing to haunt minority employees. In view of the stakes for the

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217. *See generally* J. O'CONNELL, ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975); RESTATEMENT (SECOND) OF TORTS § 402A (1957) (products liability); M. WHEELER, NO-FAULT DIVORCE (1974); Calabresi, *The Decision for Accidents: An Approach to NonFault Allocation*, 78 HARV. L. REV. 713 (1965); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Gilmore, *Products Liability—A Commentary*, 38 U. CHI. L. REV. 103 (1971); Kalven, *Torts: The Quest for Standards*, 53 CALIF. L. REV. 189 (1965); Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971).

218. As Professor Peck put it regarding one variety of fault cases, "[t]he problems of proof involved in automobile accident litigation under a negligence standard are so great that it is only blind optimism in a large number of cases to hope that what in fact occurred will become known." Peck, *supra* note 217, at 241-42. Writing of the fault system of divorce, Professor Michael Wheeler observed in 1974:

> The fault system is inconsistent, expensive, and hypocritical. As serious as these shortcomings are, the system might be tolerable if it somehow contributed to family stability in our society. But it does not. If anything it obscures the real issues in marital breakdown, and thus makes their solution all the more difficult. The fundamental weakness of fault divorce is that it is predicated on the myth that the breakdown of a marriage can be attributed solely to the wrongdoing of one spouse.

M. WHEELER, *supra* note 217, at 12.

219. *See supra* notes 52-67 and accompanying text.

220. *See generally* R. RABIN, *supra* note 65, at 1-81.

221. *See, e.g.*, Posner, *A Theory of Negligence*, *supra* note 65; Posner, *Strict Liability: A Comment*, *supra* note 65.

222. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (duty of care is function of three variables: probability of accident, gravity of resulting harm, and burden of adequate precautions); Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (same three factors).

223. Horwitz, *The Doctrine of Objective Causation*, in POLITICS, *supra* note 176, at 202.

minority victim and the innocent white worker, the moral blameworthiness of third parties (employer and union) seems a poor measure by which to distribute the harm. Similarly, notions of cost-benefit deterrence seem inappropriate because it is really the innocent white employee, not the employer or union, who will suffer the consequences of diminished seniority expectations if relief is granted, and it is questionable what such rank-and-file employees can do to prevent the perpetuation of past discrimination by their employer or union. Finally, the fear of going "too far" to redress problems of discrimination would seem to suggest a limit on Title VII liability rationally based on actual consequences, not subjectively based on motive.

It has been noted that "[d]eeply ingrained in human nature is the tendency to distinguish intended results from accidental happenings."[224] In the oft-quoted words of Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked."[225] But as is clear now, the *Swint* standard does not distinguish intended from accidental results. The disparate impact of a seniority factor engrafted upon a system of past exclusionary practices is utterly foreseeable, and by the time the plaintiff's case is filed seniority-based decisionmaking has already been producing such impact. Regardless of actual purpose, it cannot be said that the seniority system's effect on minorities is "accidental."

The *Swint* standard wholly fails to recognize that subjective purpose is of little significance in the reality of the workplace. Indeed, as one noted jurist has observed in another context:

> [W]e now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[226]

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224. R. PERKINS, *supra* note 180, at 739.

225. O.W. HOLMES, THE COMMON LAW 3 (1881).

226. Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (Judge J. Skelly Wright, sitting by designation).

Put another way:

> Beyond consciously held attitudes, racist mentality may also display what Paul Brest has descibed as "racially selective indifference." Similarly, Edgar and Jean Cahn refer to "racism by inadvertence" or "selective inattention." Such indifference is racist when it effectively denies benefits to members of the subjugated group or imposes burdens on them which would not be denied or imposed if they were white.
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> . . . .
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> The above notions hint at why racism is often so hard to identify in any articulable [*sic*] fashion. And yet today's racism is a living system, as much so as were slavery and Jim Crow. The difference is that today's racism, systematic and highly tuned, inflicts a greater proportion of its harms without trying, or thinking. Still, "[o]ne who is stumbled over often enough may, understandably, notice that these cumulative impacts bear a certain functional resemblance to kicks." It is this unthinking aspect of racism which makes nonsensical the requirement in *Washington v. Davis* that racial discrimination be proved by showing intent.
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> Racism, it becomes apparent, is not merely individualistic and attitudinal; it is also collective. It is similar to negligence in that whites often exercise a lesser standard of care in their attitudes toward and treatment of blacks than they exercise in regard to their fellow whites. Much of this is because whites are socialized under the influence of institutional racism, which consists of those racist policies and practices that are built-in components of the very structure and process of most American institutions. Often without

This phenomenon of "unthinking" discrimination means, then, that at least some seniority systems which are not truly neutral in their intent will nevertheless pass muster under the *Swint* standard. Moreover, if we inquire into the likely effect such a standard will have on the future conduct of the actors in the workplace, it is fair to assume that a rule which absolves unions and employers of any liability for a discriminatory-in-effect seniority system unless there is persuasive evidence of wrongful motivation will fail to achieve a major goal of Title VII—to provide the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of their discriminatory practices.[227]

The fault standard reinforces one political view of discrimination: that it is the work not of societal forces but of a few aberrant individuals acting on their own. As Professor Chayes has noted:

> The traditional conception of adjudication reflected the late 19th Century vision of society, which assumed that the major social and economic arrangements would result from the activities of autonomous individuals. In such a setting, the courts could be seen as an adjunct to private ordering, whose primary function was a resolution of disputes about the fair implication of individual interactions. The basic conceptions governing legal liability were "intention" and "fault."[228]

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the intent of the people involved, institutional policies and practices serve the aims of racism, excluding, disadvantaging, or stigmatizing blacks.

Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 208-09 (1982) (footnotes omitted). *See also* Schnapper, *supra* note 56, at 40; Simon, *supra* note 152, at 1060.

In a non-Title VII civil rights context, the Court recently has recognized the need to punish conduct taken with "indifference to consequences" as well as that taken with "intent to cause consequences." *See* Smith v. Wade, 103 S. Ct. 1625, 1633 n.10 (1983) (punitive damages in § 1983 action).

227. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). It is axiomatic that "a rational lawbreaker will discount the gravity of any legal sanction by the probability that it will be imposed." Posner, *A Theory of Negligence*, *supra* note 65, at 40-41 (citing Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)). *See also* Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 261 (1972).

Deterrence has consistently been emphasized by the Supreme Court as the primary goal of Title VII. *See* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 93 (1981) (Title VII is a "comprehensive [program] designed to eliminate certain varieties of employment discrimination."); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981) (Title VII was designed as a "means of eliminating employment discrimination."); Franks v. Bowman Transp. Co., 424 U.S. 747, 768 n.28 (1976) (speaking of the Act's " 'primary objective' of eradicating discrimination"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (The "primary objective" of Title VII is deterrence of discriminatory practices and the secondary objective is compensation to victims "to make persons whole for injuries suffered on account of unlawful employment discrimination."); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (The primary purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."). *But see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977) (indicating that the compensation purpose and the deterrent purpose are "equally important").

228. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *see also* Able, *Torts*, in POLITICS, *supra* note 176, at 185; Horwitz, *The Doctrine of Objective Causation*, in POLITICS, *supra* note 176, at 202 (speaking of the role of causation: "The plaintiff in a tort action should recover only because of an unlawful interference with his right, not because of any

Thus, "[o]nce [the Court] has characterized a [public law] case as private the Court can appeal to rules of private tort or contract law without having to show that those rules are appropriate to the resolution of the public questions contained in constitutional controversies."[229]

*Griggs* represented the Court's recognition that discrimination is a pervasive problem whose dimensions are societal and whose causes are rooted in the unique American experience. In disparate impact theory, individual guilt and moral blame play no more role than they do in worker's compensation schemes, which treat injury in the workplace not as a series of discrete events caused by bad employers but rather as a problem inherent in industrial society which requires a "macro" solution. *Swint* is a step backward, to a definition of discrimination as a particular act directed toward particular victims and motivated by a specific intent that can be neatly dissected into lawful and unlawful components.[230] As such, the *Swint* standard is consistent with other recent developments in civil rights case law requiring proof of strict causation[231] and adopting a significantly more restrictive view toward class certification of Title VII cases.[232]

It is clear beyond doubt that the *Swint* standard, requiring "after the fact assessments of motive,"[233] poses substantial problems of proof for litigants, especially plaintiffs. The courts have not been unmindful of these problems,[234] and the search by the parties and triers of fact for the hidden motivation behind disparate results is bound to increase what Professor Epstein refers to as "the administrative costs of decision."[235] It has been observed:

> Overt and blatant discrimination is a relatively rare phenomenon [in today's world]. The very existence of title VII, with its ban

more general public goals of the state. The idea of vindication of individual rights was intimately connected with the notions of objective causation.").

229. Comment, *Cases that Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 HARV. C.R.-C.L. L. REV. 713, 740-41 (1980). *See also* Brodin, *supra* note 65.

230. The problem of mixed-motivation has been treated elsewhere. *See* Brodin, *supra* note 65.

231. *See* Brodin, *supra* note 65.

232. *See* General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982).

233. Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1142 (1978).

234. *See* Keyes v. School Dist. No. I, 413 U.S. 189, 233 (1973) (Powell, J., concurring in part and dissenting in part) ("The intractable problems [of proving intent] involved in litigating this issue are obvious to any lawyer. The results of litigation—often arrived at subjectively by a court endeavoring to ascertain the subjective intent of school activities . . . will be fortuitous, unpredictable and even capricous."); Lodge v. Buxton, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981), *aff'd*, 102 S. Ct. 3272 (1982) ("We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, 'We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate.' Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. *Quite simply, there will be no 'smoking gun.'* "); United States v. Texas Educ. Agency, 532 F.2d 380, 388 (5th Cir. 1976) ("[I]t is difficult—and often futile—to obtain direct evidence of the official's intentions. Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official 'will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subtleties of conduct . . . play no small part.' ").

235. Epstein, *supra* note 65, at 188.

> on discrimination, and its provisions guaranteeing victims the right to damages, injunctive relief, and attorneys' fees, has meant the elimination of most such discrimination by most employers. It is intentional discrimination in its covert, hidden form that now poses the real problem. Evidence of illicit intent may be extremely difficult to obtain, whether the responsible individuals are conscious of their bias, and therefore likely to try to hide it, or whether they are expressing unconscious bias through some discretionary decisionmaking process.[236]

One aspect of the proof problem is the difficulty of ascertaining collective intent.[237] The adoption and maintenance of a seniority system generally involves the participation of numerous individuals and groups—union officials, corporate officers, negotiaters, rank-and-file workers. How many participants must be shown to have been motivated by discriminatory purpose before the seniority system falls under section 703(h)? Is it sufficient if two out of five members of the union negotiating team can be shown to have had improper motives, or must it be a majority? What if a majority of the team acted out of mixed motives (*e.g.*, a desire to keep black workers in segregated units and a desire to reward length of service)?

A motive-centered standard for seniority challenges is also subject to criticism for the effect it likely will have, both in and out of court, on the parties and the litigation. One writer has noted in a related context:

> [F]ocusing on purposefulness tends to turn a lawsuit into a personal vendetta. Plaintiff cannot succeed showing that defendants' actions are wrong by demonstrating an objective discriminatory effect; rather plaintiffs must show that defendants are bigots, and thus defendants' actions are wrongful a fortiori. If the purpose of a lawsuit is to open a dialogue between the plaintiffs and the defendants, the dialogue will be furthered by focusing on objective criteria and not upon that particular motivation which may have inspired the defendant's conduct . . . . The recent Supreme Court decisions requiring proof of discriminatory intent are more likely to promote dissension than to draw people together.[238]

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236. Bartholet, *supra* note 61, at 1202-03; *see also* Schnapper, *supra* note 56, at 49.

237. *Cf.* McGee v. South Pemiscot School Dist., 545 F.2d 171 (8th Cir. 1983). *See generally* Brodin, *supra* note 65, at 321 n.120; Simon, *supra* note 135, at 1097, 1106.

238. Seng, *The Cairo Experience: Civil Rights Litigation in a Racial Powder Keg*, 61 OR. L. REV. 285, 314 n.140 (1982). *See also* Brest, *supra* note 233, at 1147-48; Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Miller, *If "The Devil Himself Knows Not the Mind of Man," How Can Judges Know the Motivation of Legislators?*, 15 SAN DIEGO L. REV. 1167 (1978); Schnapper, *supra* note 56, at 31.

Professor Wheeler has observed in the matrimonial area:

> The adversary nature of fault divorce can add to a me-against-you momentum which is hard to stop.
>
> . . . .
>
> Requiring one person to find fault with the other aggravates an already unhappy situation and further diminishes whatever chance there might be of salvaging the marriage.

M. WHEELER, *supra* note 217, at 13-14.

Motive inquiry poisons the atmosphere of the labor dispute and turns the litigation into a swearing contest, while the actual results of the employment practice and the business justifications for it become lost in the battle. Such an atmosphere is not conducive to nonlitigation solutions, such as an agreement to shorten the work week rather than layoff employees.[239] A finding by the court of bad motive will alienate and embarrass the defendants, not making for a productive or pleasant atmosphere in which to continue work. Moreover judges may be more reluctant to rule for plaintiffs when doing so means characterizing corporate or union officials as bigots.

The *Swint* standard shifts the concentration of all concerned from the alleged fact that minority or female employees are being unjustifiably stymied in their efforts to advance or retain their jobs to the personal virtues or faults of the defendants. The problem itself—the obstacle to employment opportunities—is relevant only insofar as it can be said to evidence defendants' hidden motives.

Since motive analysis is so subjective, furthermore, a standard like *Swint* is an invitation for judges to act, in the words of one scholar, as "an imperial judiciary,"[240] reading their own social and political views into the decision at hand. As Professor Tribe has aptly observed, "[T]he problems of proof raised by [an intent] test are treacherous at best, and the discretion it leaves the court in actual cases is enormous."[241]

## III. CONCLUSION

The question of how to balance the interests of victims of past discrimination against those of incumbent white workers with accrued seniority expectations is as difficult a question as is faced in fair employment law. It is the premise of this Article that a more enlightened approach must be found than the motive-centered *Swint* standard. The language and legislative history surrounding section 703(h) leaves, it is submitted, room for such an approach; *Griggs* provides its framework.

If, as several justices of the Court have suggested, section 703(h) is read as a "grandfather clause" to protect only seniority expectations accruing prior to the effective date of Title VII, then disparate impact theory would control most present seniority cases as it does challenges to other employment practices. Judicial scrutiny would then focus on workplace reality, not mind-reading. *Griggs* permits the employer to defend, not by resort to denial of bad thoughts, but by a showing of actual business justification for the practice.

In defense of strict liability in tort, many have argued that "*A* caused *B* harm" is sufficient justification for the imposition of liability notwithstanding the level of blameworthiness that can be ascribed to the defendant.[242] Title

239. *See generally* Cooper & Sobol, *supra* note 17, at 1635-36; Note, *supra* note 8.
240. Miller, *supra* note 238, at 1170.
241. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-19 (1978).
242. Epstein, *supra* note 65, at 152.

VII seniority cases should be afforded the same treatment, by application of the *Griggs* principle, in order to further the lofty goals of the statute.[243] But even if some notion of fault is to be retained, it should at least be informed by the non-motive based standards prevailing in most areas of tort and criminal law. Motive inquiry adds little light, and much unwanted heat, to the debate over seniority systems and equal employment opportunity.

243. As Eric Schnapper has so eloquently put it:

> Elimination of new acts of discrimination against blacks, as against women and other groups, will remain an important problem in the years ahead. But the central discrimination issue of the 1980's will be to end the perpetuation of past discrimination. If this goal is not accomplished, the speeches, judicial decisions, and legislation of the past two decades may merely continue the string of broken promises of racial justice. The federal courts, which since *Brown* have repeatedly demonstrated their determination to eliminate intentional discrimination, must be equally vigilant and vigorous in ensuring that the effects of that constitutionally condemned discrimination, and the practices that perpetuate those effects, are also "eliminated root and branch."

Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 864 (1983).